

91-359

No. 91-

Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE CITY OF NEW YORK, DEPARTMENT OF
PERSONNEL, JUAN ORTIZ, AND NICHOLAS
LA PORTE, JR.,

Petitioners,
-against-

DR. JUDITH PIESCO,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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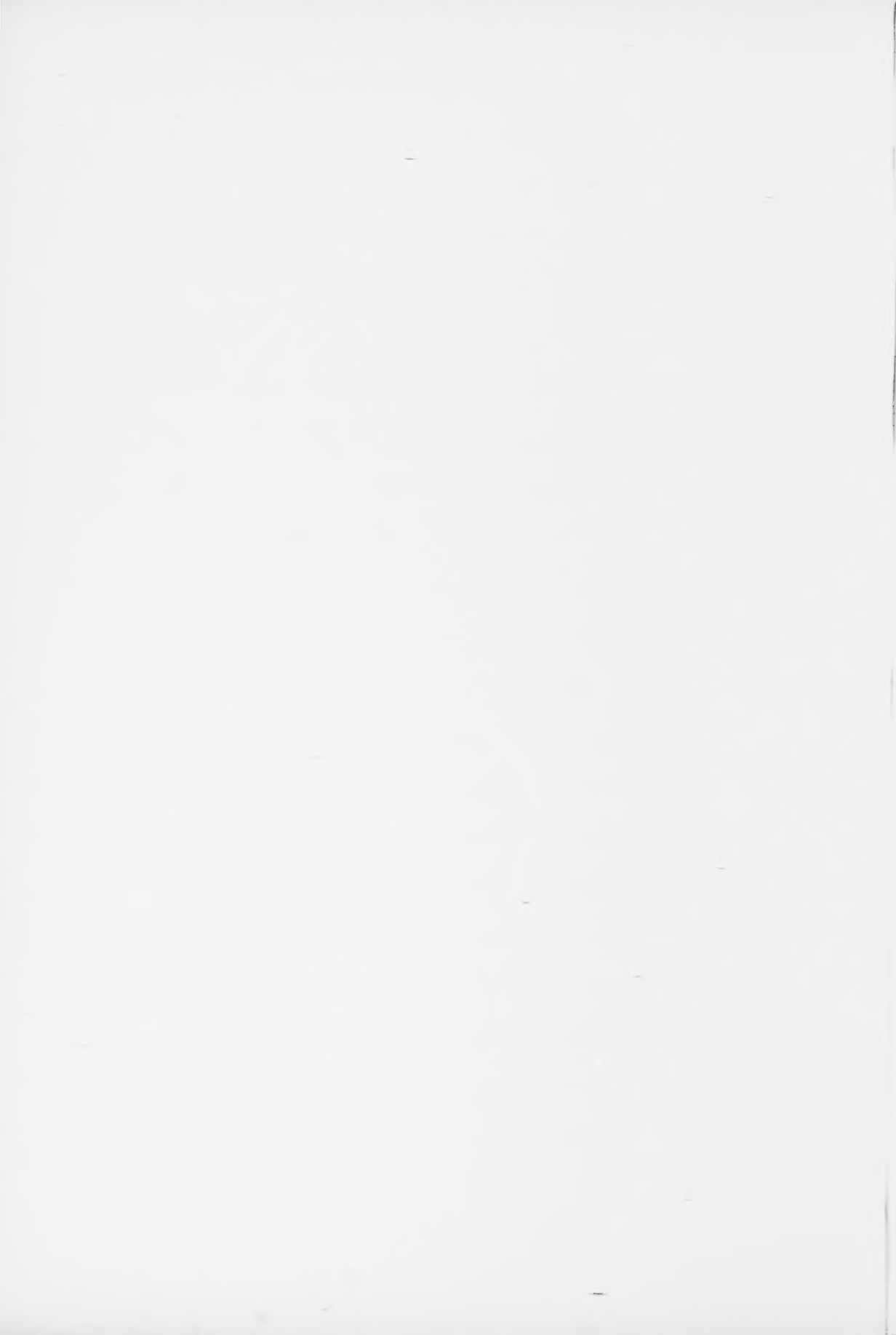
August 28, 1991.



QUESTIONS PRESENTED

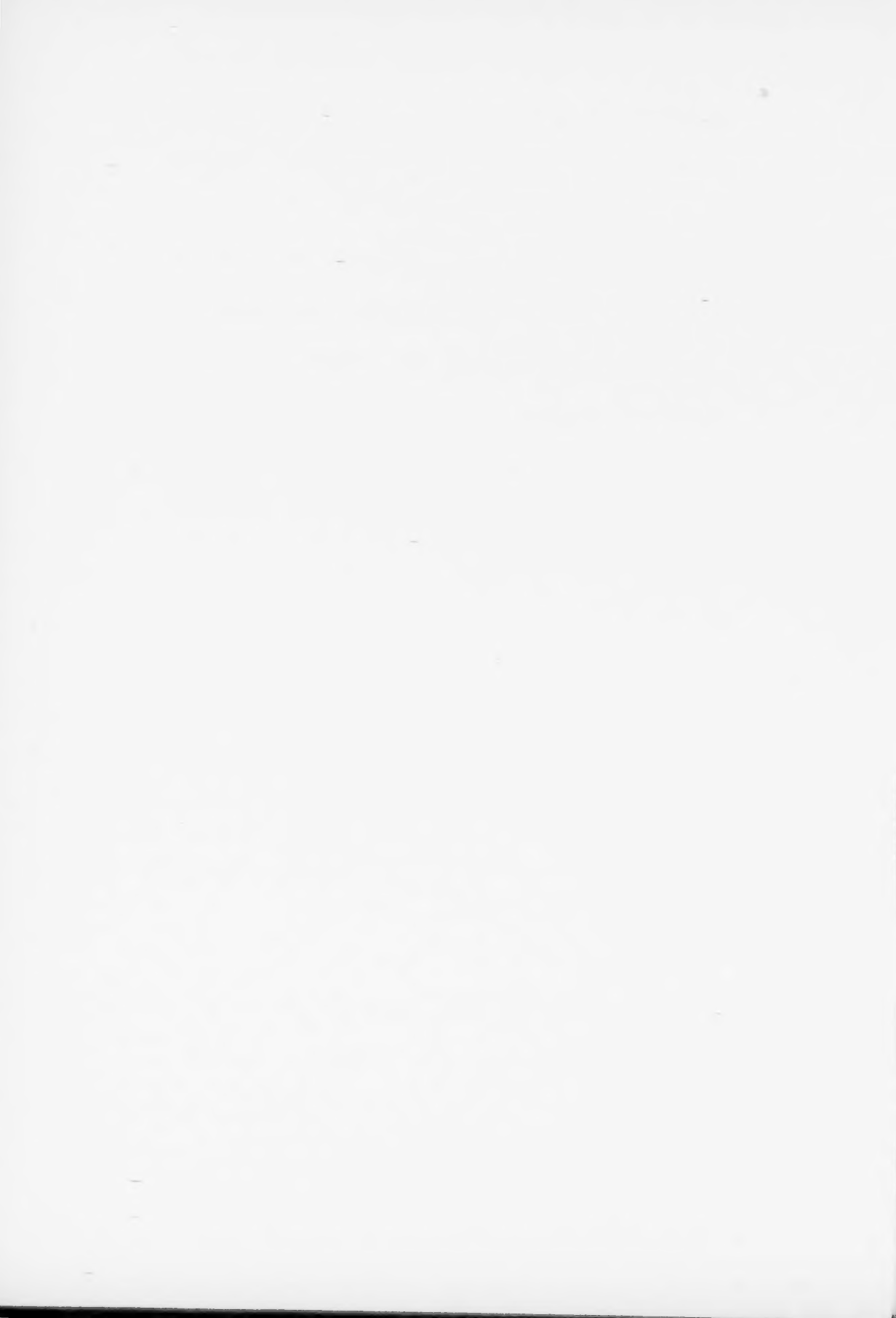
1. Whether the Court of Appeals for the Second Circuit erred in effectively conferring absolute first amendment protection to legislative testimony given by high-ranking government officials notwithstanding its acknowledgement that under Pickering v. Board of Education, 391 U.S. 563 (1968), the Court must balance the employee's interest in making the comments against the government's interest in ensuring its efficient operations?

2. Whether the Court's holding requiring the Personnel Department to submit evidence of actual disruption to the agency's functioning resulting from comments made by the Deputy Personnel Director before a legislative hearing that a "moron" or a "functional illiterate" could pass the police civil service test is inconsistent with Connick v. Myers, 461 U.S. 138 (1983), where this



Court held that a public employer is not required to wait until "the disruption of working relationships is manifest before taking action"?

3. By failing to consider the specific facts of this case in applying the qualified immunity doctrine, did the Court of Appeals apply an immunity test which is inconsistent with the test formulated and applied by other Circuits in first amendment employee discipline cases?



PARTIES

Petitioners, the defendants below, are the Department of Personnel of City of New York, Juan Ortiz, individually and in his capacity as Personnel Director, and Nicholas LaPorte, Jr., individually and in his capacity as Deputy Personnel Director.

Respondent, plaintiff below, is Dr. Judith Piesco.



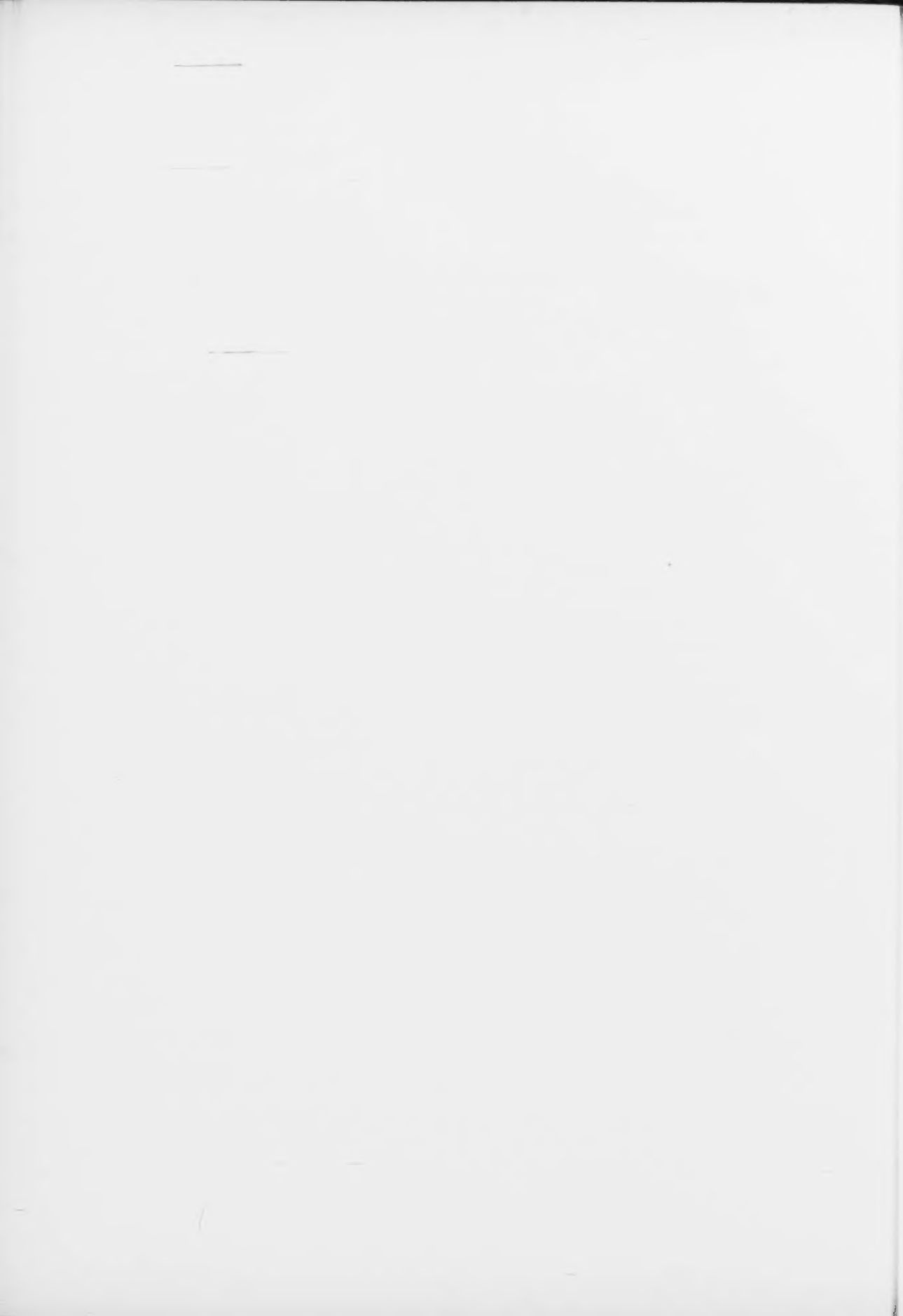
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioners, the Department of
Personnel of the City of New York, Juan
Ortiz and Nicholas LaPorte, Jr., respectfully
pray that a Writ of Certiorari issue to review
the decision of the United States Court of
Appeals for the Second Circuit entered in



this action on June 3, 1991, which reversed so much of the judgment of the United States District Court for the Southern District of New York (Martin, D.C.J.), entered December 25, 1990, as dismissed respondent's first amendment claim.

OPINIONS BELOW

The opinion of the Court of Appeals dated June 3, 1991 is reported at 933 F.2d 1149 (2d Cir., 1991). A copy is reprinted in the Appendix to this Petition at page 1. The opinion of the United States District Court for the Southern District of New York (Martin, D.C.J.), dated December 18, 1990, is reported at 753 F. Supp. 468 (S.D.N.Y., 1990). A copy is reprinted in the Appendix at page 56.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered June 3,



1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition has been filed within the time allowed by law.

STATEMENT OF THE CASE

(1)

Respondent, Judith Piesco, was terminated as Deputy Personnel Director for Examinations for the New York City Department of Personnel after she testified at a State Senate Committee hearing that a "moron" or a "functional illiterate" could pass Examination No. 4061 for appointment to the position of police officer.

As Deputy Personnel Director, a position Piesco held on a provisional basis, she was one of the highest ranked officials in the Department. Only petitioner Juan Ortiz, the Personnel Director, and petitioner Nicholas LaPorte, Jr., the First Deputy Personnel Director, ranked above her

(CA136d, CA140).¹ Piesco was responsible for the development, preparation, evaluation and administration of all civil service examinations for the City of New York. She was also responsible for advising Ortiz, LaPorte and other City officials concerning such matters (CA6, CA92-93).

One of the tests developed and administered under Piesco's supervision was Examination No. 4061 for appointment to the position of police officer (CA340). In February 1985, Piesco, together with Ortiz and LaPorte, met with Police Department officials to establish a passing grade for that examination (CA39 ¶7; CA95-97;

¹ Unless otherwise indicated, numbers in parentheses preceded by the letters "CA" refer to pages of the joint Appendix in the Court of Appeals. Numbers preceded by the letter "A" refer to pages of the Appendix to this petition.



CA144-145). Piesco advocated a passing score of 89% while the Police Department advocated a score of 82% (CA95-96). Prior to this meeting, Ortiz and Piesco had discussed his concerns that a 89% passing grade would have a disparate impact on minorities and that the examination could be challenged on that ground (CA96-97). At the meeting, a passing grade of 85% was established. To achieve this grade, a candidate had to answer correctly 119 of the test's 140 questions (CA335). To achieve the passing grade advocated by Piesco (89%), a candidate would be required to answer 125 questions correctly (CA335). Thus, there was a difference of only six correct questions between the passing grade advocated by Piesco and the score which was established.



(2)

In June 1985, Plesco, together with Ortiz and LaPorte, met with members of the staff of the New York State Senate Committee on Investigations, Taxation, and Government Operations which was conducting a review of Police Department management (CA106). It is undisputed that Plesco indicated at this meeting that a "moron" could pass Examination No. 4061 at the passing grade established by the Department (CA106). The only dispute is whether Plesco or a member of the Senate Committee staff first used the word "moron" (CA106, CA371).

Thereafter, Plesco and Ortiz appeared at a hearing before the State Senate Committee on July 11, 1985. Although Ortiz intended to speak on behalf of the Department as its agency head, the Committee requested that Ortiz allow Plesco



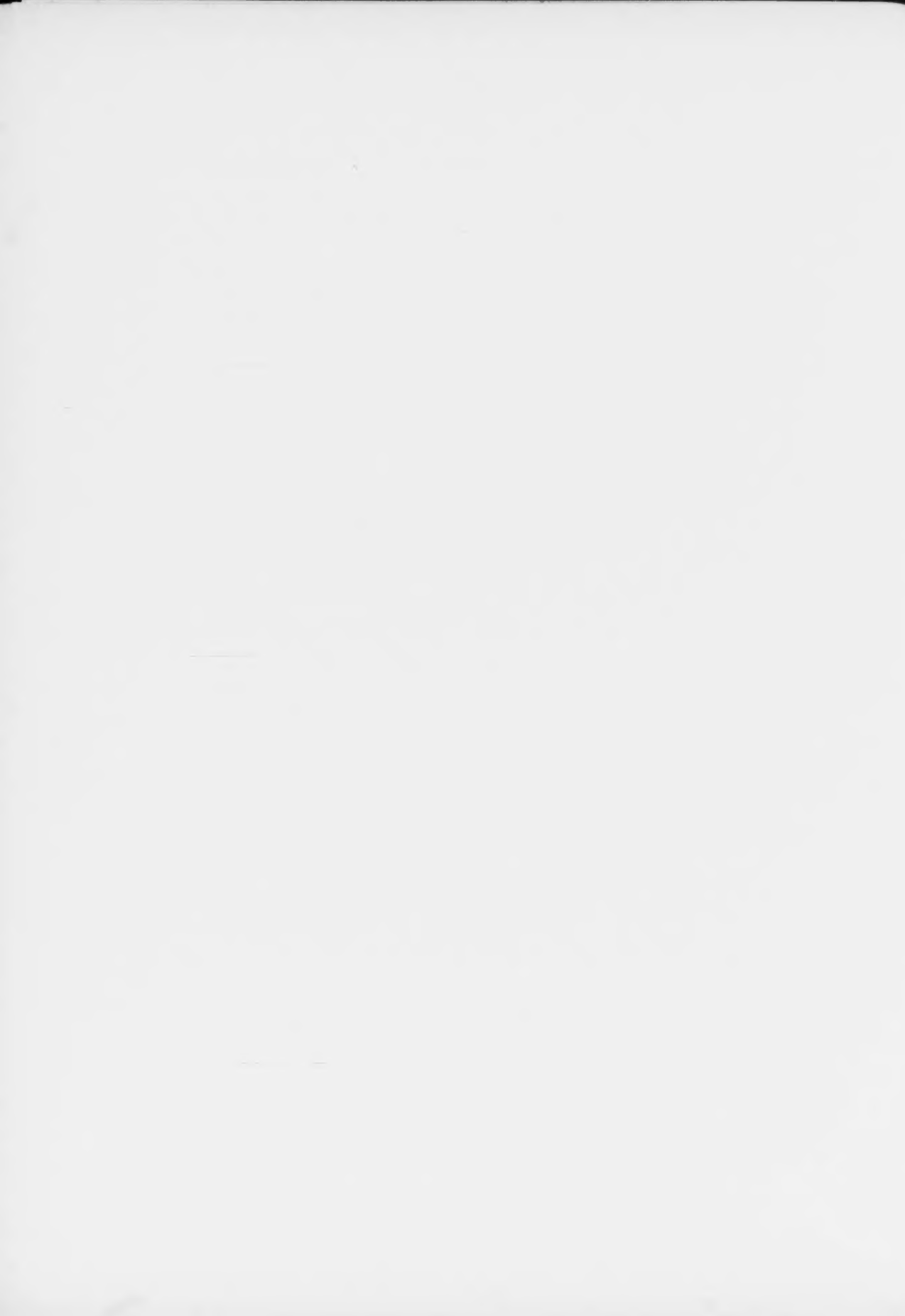
to testify (CA262(c), CA165). The following colloquy then took place (CA166-167):

SENATOR GOODMAN: Is it not a fact that under questioning by this commission['s] staff you indicated that the written exam was so easy "that a moron could pass"?

DR. PIESCO: The conversation that we had was a very informal conversation, and if I used it as characterization, I think it was rather unfortunate[.] I was not obviously aware of the [sic] that the conversation which was informal was in the way of cross-examination. I certainly would have modified my statement merely because the term "moron" is rather offensive and has certain technical meanings. The answer to your question is yes.

* * *

SENATOR GOODMAN: Would a functional illiterate pass the entrance examination to the police academy?



DR. PIESCO: At the pass mark that is set, I would say that it is possible.

SENATOR BERNSTEIN: If a functional illiterate has passed the examination, what would be his chances, [sic] and in your opinion would you say that the chances of such an illiterate being appointed to the Department would be good or minimal?

DR. PIESCO: I don't know what goes on in the selection after we give the list to the Police Department.

(3)

The day after the legislative hearing, Ortiz wrote a memorandum to then - Mayor Koch concerning Piesco's comments at the hearing. Ortiz stated that he considered Piesco's comments to be irresponsible. Ortiz explained that the factors he considered in establishing the pass mark included (1) insuring the quality of police officers; (2) providing the Police Department, over the life of the eligible list, with a sufficient



number of candidates to fulfill its hiring needs; (3) the fact that the examination was only the first of several screening devices before an appointment is made (i.e., candidates must pass a rigorous curriculum at the Police Academy, an eighteen-month probationary period, and medical, psychological, character, and physical testing); and (4) the mandate of Title VII to minimize the disparate impact on minority candidates (CA337). Ortiz also explained that Dr. Landy, the outside consultant hired by the Department to help develop the test, had agreed that a passing grade of 85% was a sound one (CA 337-339).

On July 31, 1985, Ortiz met with Piesco and other members of his staff. This was the first such meeting since the Senate Committee hearing (CA342). It is undisputed that during this meeting, Piesco made certain offensive and insubordinate

comments to Ortiz. After the meeting, Ortiz wrote a memorandum dated August 2, 1985 addressed to Piesco, in which he stated that (CA341):

[because of your behavior at the meeting I had to] discontinue the meeting and ask you to leave my office. This happened immediately after a discussion of your role in the last Police Officer test and your failure to look at the test or the questions before the test was administered. Specifically, without cause or provocation you stood up, pointed your finger at me in an aggressive manner and yelled "you don't know a fucking thing about testing. I am fed up with your bullshit and inaptitude". When I asked you to calm down and conduct yourself in a civil and professional manner you stated "I don't have to do a fucking thing, why don't you fire me?".

Piesco has acknowledged that with the exception of the word "inaptitude", the memorandum was accurate in substance and



in the severity of the language used (CA135).

According to Piesco, although it had been customary for her to meet with Ortiz and LaPorte several times each week, after her testimony, her contact with Ortiz and LaPorte were curtailed (CA112; CA342). Additionally, she was excluded from meetings with other City officials up to the time she was terminated as Deputy Personnel Director on December 27, 1985 (CA112, CA348).²

² Prior to her termination, the New York City Department of Investigation (DOI) investigated Piesco's allegations that she was given poor evaluations and excluded from meetings in retaliation for her testimony (CA369 - 377). DOI concluded that the evaluations were improperly prepared in order to highlight criticisms of Piesco's behavior. After Piesco's discharge, the State Senate Committee on Investigations, Taxation and Government Operations held hearings regarding Piesco's allegations and the Committee concluded that she was discharged "in significant measure" because of her testimony before the Committee.



(4)

Piesco commenced this action pursuant to 42 U.S.C. §1983 alleging, inter alia, that she was given poor performance evaluations, was excluded from meetings and was ultimately dismissed from her position in retaliation for her comments before the State Senate Committee. Piesco alleged that petitioners' actions violated her first amendment and due process rights. Additionally, she interposed pendent state claims.

The District Court Opinion

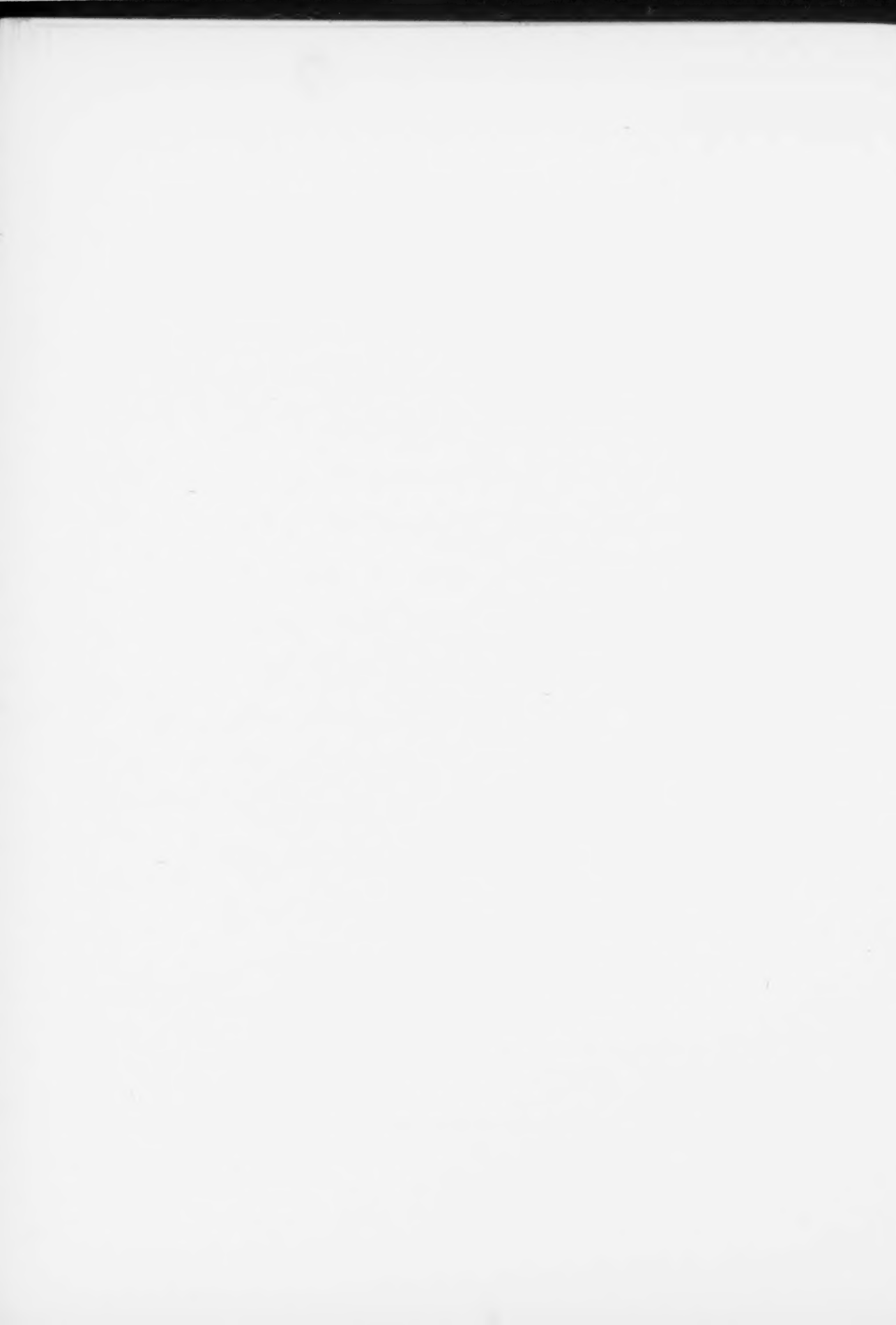
The District Court granted the petitioners' motion for summary judgment and dismissed the complaint in its entirety (A56-102). With respect to Piesco's first amendment claim, the Court applied the balancing test set forth in Pickering v. Board of Education, 391 U.S. 563 (1968), "to arrive at a balance between the interest



of the [employee] as a citizen in commenting upon matters of public concern and the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees" (A68-69).

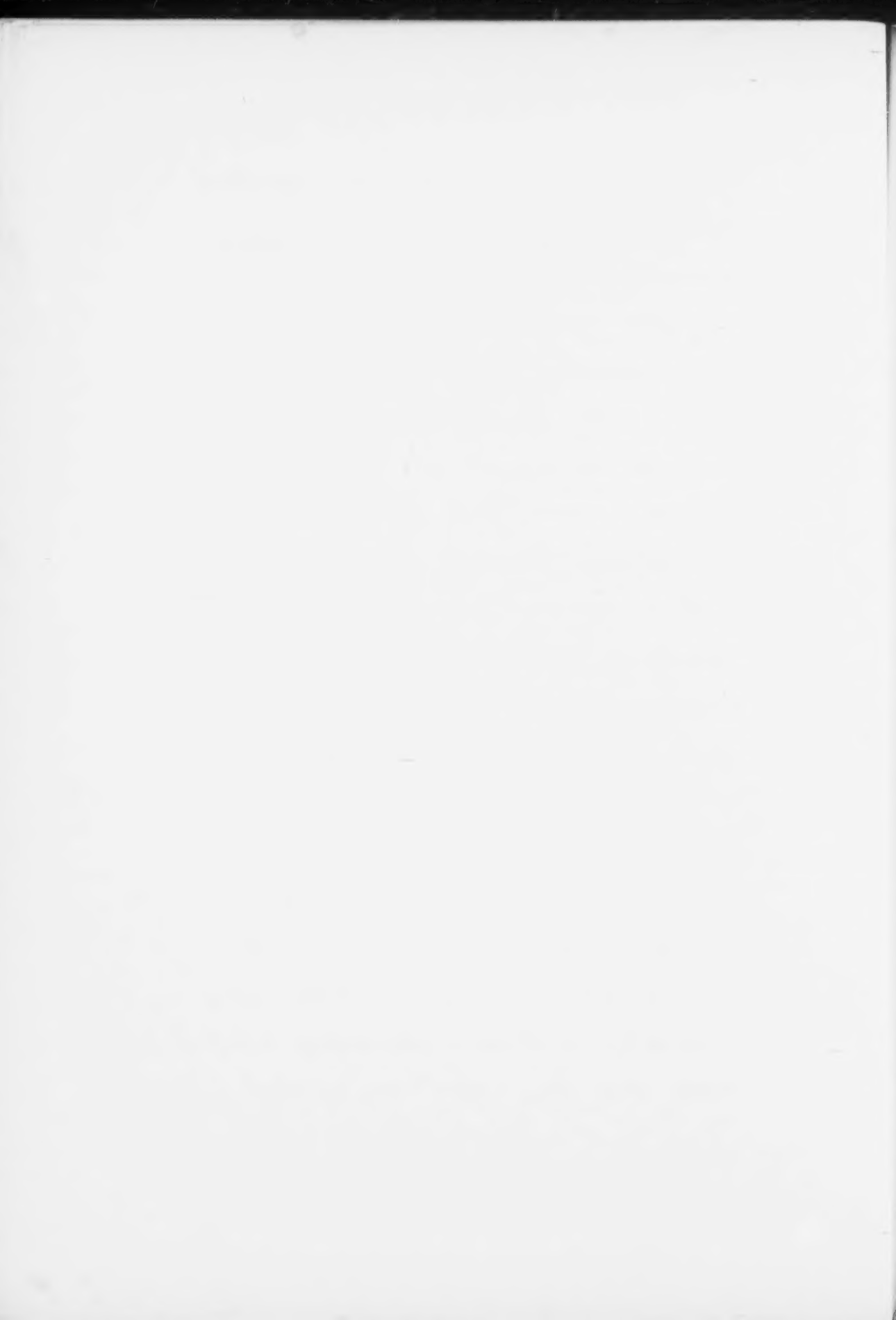
The District Court acknowledged that Piesco was required to testify truthfully and that her comments did relate to matters of public concern (A71). The Court noted, however, that although it was possible that a "functional illiterate" could pass the examination, according to Piesco's own affidavit, it was only a theoretical possibility.³ Thus, it was irresponsible for Piesco to testify that it was possible for a

³ According to Piesco, it was possible for a "functional illiterate" to achieve the 85% passing grade through a combination of skill, "sheer luck" and "wild guessing" (CA362).



"functional illiterate" to pass the examination "without amplifying her testimony to indicate how extremely remote that possibility was" (A75-76). Additionally, Plesco's remarks were "inflammatory" in light of the public debate over minority hiring practices (A72-A73).

The District Court further reasoned that Plesco's comments undermined the judgment of her superiors and Police Department officials in establishing the passing grade and that it was "critical" for her to maintain a close working relationship of trust and confidence not only with her superiors but also with other high-level City officials. Thus, the Court concluded that Plesco's statements "so severely undermined the working relationships which were required for an effective performance of her duties that the City's interest as an



employer outweighs Dr. Plesco's speech interest" (A77-83).

Finally, the District Court held that even if the Pickering balance had favored Plesco, her first amendment claim must nevertheless be dismissed against Ortiz and LaPorte on the grounds of qualified immunity (A83-85).

The Court of Appeals Decision

Although the Court of Appeals affirmed the dismissal of Plesco's due process and pendent state claims, it reversed the District Court's dismissal of Plesco's first amendment claim (A1-55). The Court held that the Pickering balance favored Plesco. It reasoned that the District Court had failed to accord sufficient weight to Plesco's speech interest and that (A46-47):

[a] government employee called to testify before a legislative committee about work-related matters would be confronted with a Hobson's



choice. She could either (1) honestly answer the question, in which case, as a matter of law, she could be fired; (2) commit perjury; or (3) refuse to answer the question posed and be held in contempt, ... By offering a government employee the option of jail or unemployment, we would put our imprimatur on chilling speech in a forum where candor is critical to informed decision-making. This we decline to do.

The Court of Appeals also rejected the District Court's reasoning that Piesco, as a high-level City official testifying on a sensitive subject, had an obligation not only to testify truthfully, but also responsibly by elaborating on her testimony (A41-42).

Moreover, the Court of Appeals held that the Pickering balance favored Piesco because the petitioners failed to submit any evidence that Piesco's comments caused actual disruption to the efficient functioning of the agency (A45-47).



Finally, the Court held that Ortiz and LaPorte were not entitled to qualified immunity because it was clear at the time of Piesco's termination that her discharge would be unlawful (A49-53).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has effectively conferred absolute first amendment protection to all legislative testimony given by high-ranking government officials, notwithstanding its acknowledgment that under Pickering v. Board of Education, 391 U.S. 563 (1968), the Court must balance the employee's interest in making the comments against the government's interest in ensuring its efficient operation. This is without precedent.

Furthermore, the Court of Appeals' holding requiring the public employer in this case to submit evidence of actual disruption



to the agency's functioning resulting from the employee's comments is inconsistent with Connick v. Myers, 461 U.S. 138 (1983). Under Connick, an employer is not required to wait until "the disruption of working relationships is manifest before taking action". Although this Court did caution that "a stronger showing may be necessary" in cases where the "employee's speech more substantially involved matters of public concern", this Court has not addressed whether proof of actual disruption is required to make this "stronger showing". The Circuits which have addressed this issue are divided.

Additionally, the Court of Appeals, in denying the individual petitioners qualified immunity, failed to consider the specific facts of this case and applied a qualified immunity test which is inconsistent with the



test formulated and applied by other Circuits in Pickering type cases.⁴

Although this case comes before this Court in the context of a motion for summary judgment, the legal issues presented by this case "are sufficiently isolated from the factual controversies so as to make this case a suitable vehicle for review". Saye v. Williams, 452 U.S. 926, 930 (1981) (Rehnquist, J., dissenting from the denial of certiorari in a case involving the application of the Pickering balance); see also, Rankin v. McPherson, 483 U.S. 378, reh. den., 483 U.S. 1056 (1987) (certiorari granted to review the reversal of a grant of

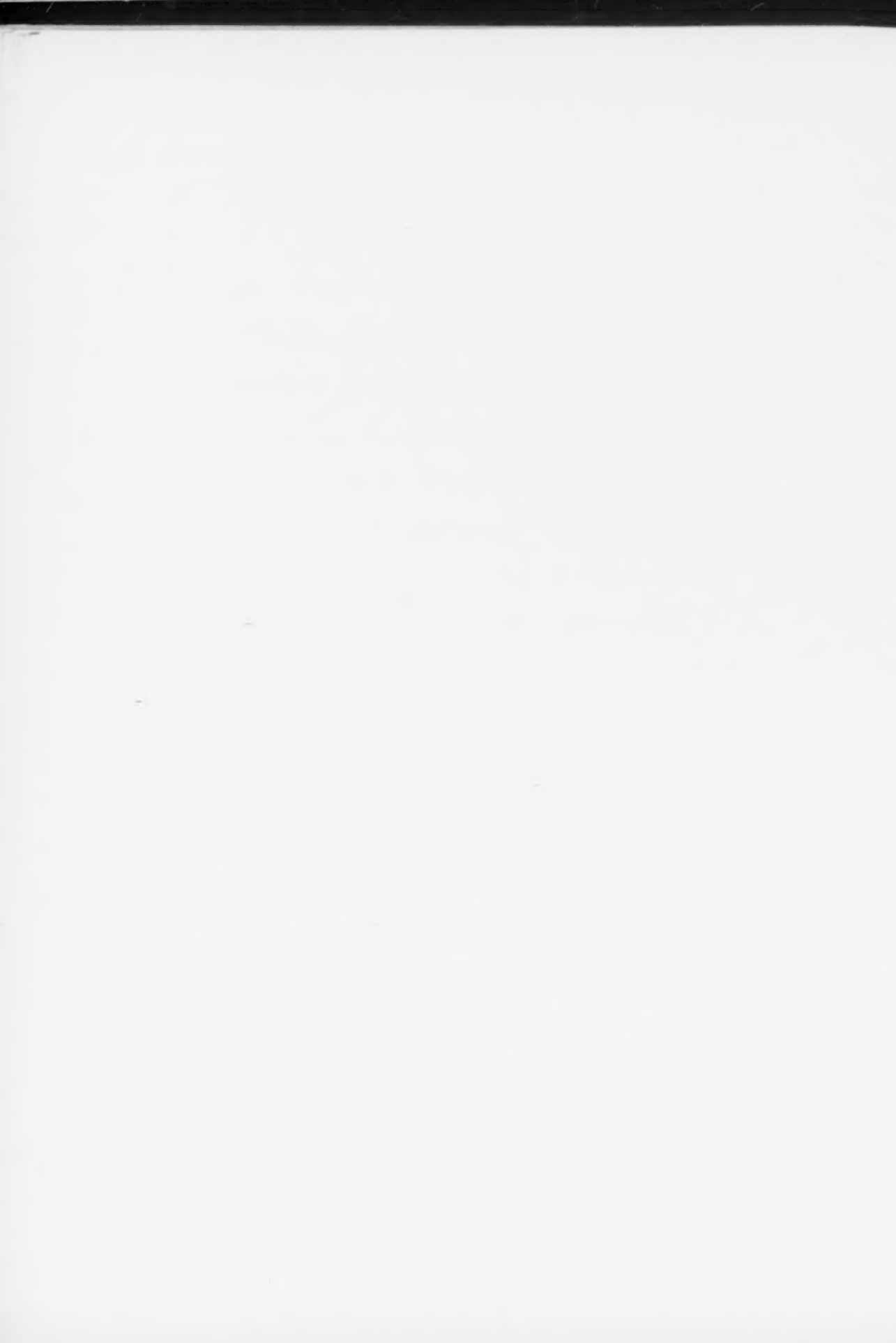
⁴ This Court has not addressed the application of the qualified immunity doctrine to Pickering type cases.



summary judgment in favor of a public employer under the Pickering balance).⁵

Further, this case involves the application of the qualified immunity doctrine, an issue which should be resolved prior to trial. Qualified immunity is immunity from suit, rather than a mere defense to liability and thus, is effectively lost if the case is erroneously permitted to go to trial. See, Mitchell v. Forsyth, 472 U.S. 511, 526-527 (1985).

⁵ Although it is undisputed that the Personnel Department received complaints about Piesco's disruptive comments at meetings with other agencies (i.e., in separate instances, she called the Sanitation Commissioner a "fucking liar" and a high level Police Department official a "liar"), Piesco's allegation that she was terminated in retaliation for her legislative testimony must be accepted as true. Additionally, for the purposes of petitioners' motion for summary judgment, Piesco's allegation that she testified truthfully before the Senate Committee must be accepted as true.



1. The Court of Appeals has effectively conferred absolute first amendment protection to testimony given by high-level public officials before legislative committees.

In determining that Plesco's testimony that a "moron" or a "functional illiterate" could pass the police civil service test was entitled to first amendment protection, the Court of Appeals reasoned that (A46-47):

[a] government employee called to testify before a legislative committee about work-related matters would be confronted with a Hobson's choice. She could either (1) honestly answer the question, in which case, as a matter of law, she could be fired; (2) commit perjury; or (3) refuse to answer the question posed and be held in contempt. ... By offering a government employee the option of jail or unemployment, we would put our imprimatur on chilling speech in a forum where candor is critical to informed decision-making. This we decline to do.

The Court of Appeals has thus indicated its unwillingness to ever permit the



termination of public employees for testimony given before the legislature. Under the Court's reasoning, the state's interest would never outweigh the employee's speech interest regardless of the employee's position, the content of the speech, the confidential nature of his or her disclosure, or the disruptive effect of those comments. Thus, although the Court of Appeals performed a Pickering balance in this case, it afforded such weight to Plesco's legislative testimony that it effectively insulated such speech from the Pickering inquiry.

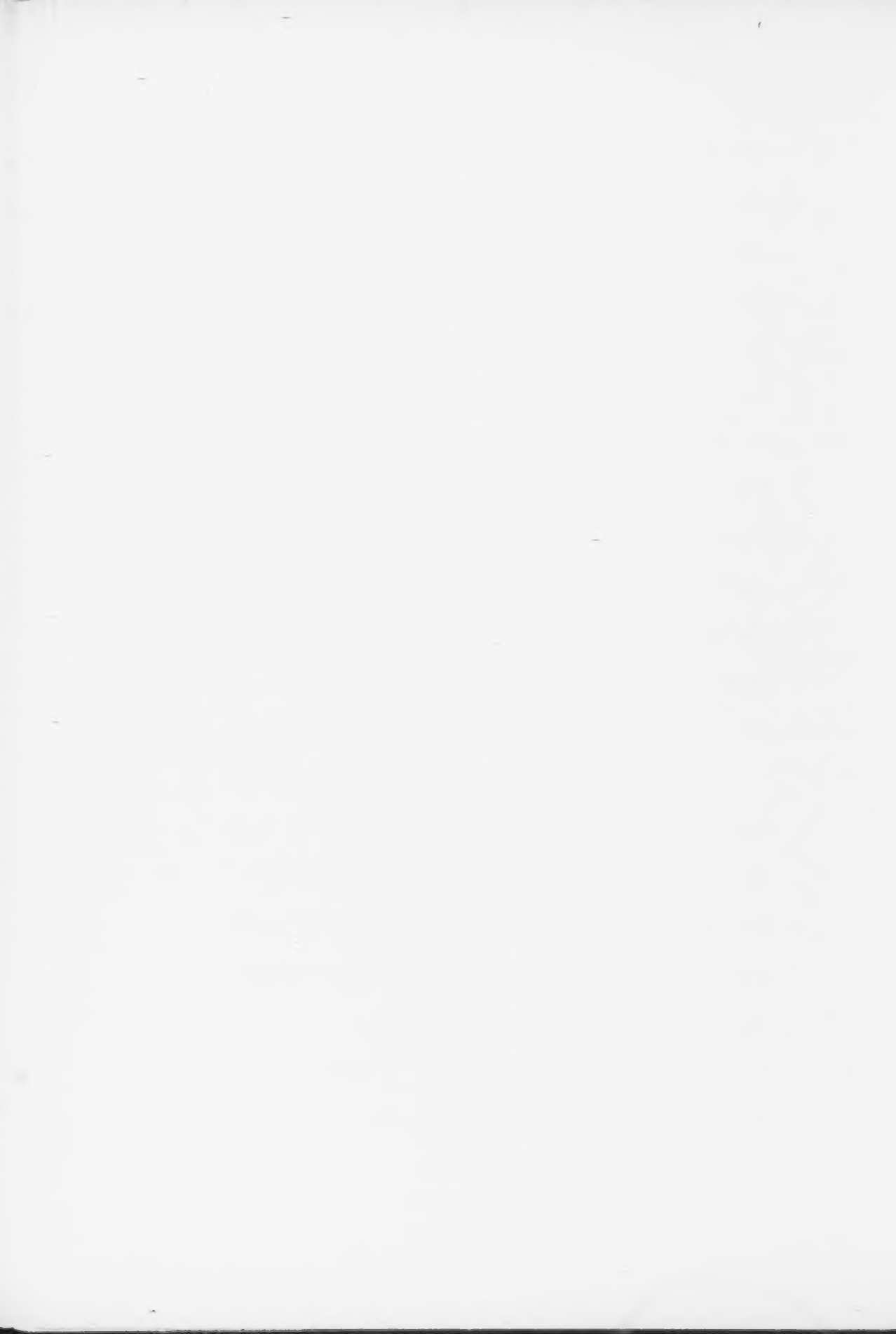
The insulation of such speech from the Pickering balance is without precedent. It is contrary to this Court's holding that a public employee's first amendment rights are, by necessity, not absolute since the government has a legitimate and significant interest in "'promot[ing] efficiency and integrity in the discharge of official duties,



and to mainta[in][ing] proper discipline in the public service'". Connick v. Myers, supra, 461 U.S. at 151 (quoting from Exparte Curtis, 106 U.S. 371, 373 (1882)).

Further, affording legislative testimony absolute first amendment protection regardless of its content and the interests of the government is also contrary to this Court's direction that the forum of the speech should not be determinative of its protective status. See, Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

Petitioners recognize the importance of the legislative fact-finding function, as well as the employee's interest in testifying before such committees. These factors must and should be considered in determining whether the speech raises matters of public concern and the weight to be accorded such speech in the Pickering balance. See,



Connick v. Myers, supra (whether speech is a matter of public concern is determined not only by its content, but also the form and the context of the speech).

These factors, however, should be balanced against the government's interests. See, Patteson v. Johnson, 787 F.2d 1245 (8th Cir., 1986). (The Court applied the Pickering balance where a Deputy State Auditor was terminated for testifying before a legislative committee. In striking the balance in favor of the employee, the Court reasoned that the employee had a "legitimate and substantial interest" in testifying truthfully, while the state's interest was "moderate at best" because the working relationships involved were strained before the testimony).

Petitioners submit that there is no reason to confer absolute first amendment protection to legislative testimony since the



Pickering factors adequately protect the interests of the employee as well as the government. The unwillingness of the Court of Appeals to hold public employees accountable for such speech is based on the fallacy that the employee has only three options when called to testify - either to testify truthfully, to lie, or to refuse to answer. High-level policy-making officials, who are testifying on behalf of their agencies, however, have an obligation not only to testify truthfully, but also responsibly. Responsibly means that such officials must give more than a yes/no answer when appropriate, must exercise some judgment in the choice of their words, and must accurately reflect the legitimate concerns of their agencies.

Imposing such a requirement on high-level employees is consistent with this Court's recognition that "[t]he burden of



caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." Rankin v. McPherson, 483 U.S. 378, 390, reh. den., 483 U.S. 1056 (1987). Further, it is permissible to place certain requirements on high-level policy-making officials which could not be required of other public employees because of first amendment concerns. See, Rutan v. Republican Party of Illinois, ___ U.S. ___, 110 S.Ct. 2729, 2737, reh. den., ___ U.S. ___, 111 S.Ct. 13 (1990) (political party affiliation is an appropriate requirement for some high-level government positions because of the government's interest in securing employees who will loyally implement its policies).

In sum, the Court of Appeals erred by conferring absolute first amendment protection to Plesco's legislative testimony

and by refusing to impose a requirement upon her to speak responsibly. That requirement if it had been imposed would not have been satisfied in this case.

Plesco's superiors, in consultation with Police Department officials, decided to establish a lower passing grade (85% or 119 correct answers out of 140 questions) than the one advocated by Plesco (89% or 125 correct answers). A policy determination had been made in favor of securing a larger pool of candidates in the initial screening stage. Additionally, the Department was required to minimize the disparate impact on minority candidates. It was irresponsible for Plesco, as Deputy Personnel Director for Examinations, to simply state that it was possible for a "moron" or a "functional illiterate" to pass the examination at the 85% pass mark, without even attempting to



explain what that possibility was,⁶ or the fact that the examination was only the first screening test. See, Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir.), cert. den., 488 U.S. 909 (1988) (speech in the course of an employee's duties will reflect upon the employee's competence to perform his or her job); Hall v. Ford, 856 F.2d 255 (D.C. Cir., 1988) (employee's speech which reflected a policy disagreement with his superiors was a proper basis for dismissal).

⁶ Piesco explained in her affidavit in opposition to petitioners' summary judgment motion that a "functional illiterate" would be able to achieve the passing grade through a combination of knowledge, "wild guessing" and "sheer luck" (CA362).



2. The Court of Appeals' requirement that petitioners must submit evidence of actual disruption to the Department's efficient functioning resulting from Piesco's comments is contrary to Connick v. Myers.

As Deputy Personnel Director for Examinations, Piesco was responsible for advising Ortiz, LaPorte and other City officials on all civil service examinations matters. Thus, in order to perform her duties properly, she was required to maintain a close working relationship of mutual trust and confidence not only with her superiors but also with other City officials. Piesco's comments that a "moron" or a "functional illiterate" could pass the police civil service test undermined the judgment of her superiors and Police Department officials in establishing the passing grade at 85%. Ortiz stated in a memorandum to the Mayor that he considered



Piesco's comments to be irresponsible. At the first departmental meeting after her testimony, when the police examination was discussed, Piesco and Ortiz had a verbal confrontation in which Piesco challenged Ortiz's competency and authority in front of other staff members. Finally, according to Piesco herself, her meetings with Ortiz, LaPorte and other City officials were curtailed after her testimony.

Notwithstanding all of the above undisputed facts, the Court of Appeals found that Piesco's comments had not interfered with the Department's efficient functioning. The Court would not infer the disruptive or potential disruptive effect of Piesco's speech on her working relationships. Rather, the Court held that petitioners were required to submit evidence that Piesco's speech actually interfered with the



Department's operation and the performance of Plesco's duties.

The Court of Appeals' holding is inconsistent with Connick v. Myers, supra, where this Court specifically rejected the argument that once it is determined that the speech raises matters of public concern, the government then has the burden to clearly demonstrate that the speech substantially interfered with the Department's operation. Id. at 150. In Connick, an assistant district attorney was terminated after she circulated an office questionnaire inquiring, among other things, whether the employees felt pressure from their superiors to work in political campaigns. Although this speech raised matters of public concern, this Court held that the district attorney was not required to "tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close



working relationships". Id. at 154. This Court stated (Id. at 151-52):

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

Some Circuits, including the Second Circuit in this case, have interpreted the term "a stronger showing" to require evidence of actual disruption where the speech substantially involved matters of public concern. See, e.g., Melton v. City of Oklahoma City, 879 F.2d 706, reh. granted on other grounds, 888 F.2d 724 (10th Cir., 1989); Matherne v. Wilson, 851

F.2d 752, 761 n.53 (5th Cir., 1988); Roth v. Veteran's Administration, 856 F.2d 1401, 1407 (9th Cir., 1988).

Other Circuits, however, have rejected the argument that proof of actual disruption is necessary. These Courts have continued to infer and recognize the potential disruptive effect of the speech from its content and the position the employee holds. See, e.g., Hall v. Ford, *supra*, 856 F.2d at 260-261; Germann v. City of Kansas City, 776 F.2d 761, 765 (8th Cir., 1984), *cert. den.*, 479 U.S. 813 (1986).

Although this Court has not specifically addressed this issue since Connick, Justice Scalia, in a subsequent Pickering case involving the termination of a clerk in a County Constable's office, noted that certain statements carry "the clear potential for undermining office relations" and that the Constable has a strong interest in

preventing such comments "regardless of whether the statements actually interfere with office operations . . . or demonstrate character traits that make the speaker unsuitable for law enforcement work." Rankin v. McPherson, supra, 480 U.S. at 399 (Scalia, J., dissenting in an opinion joined by the Chief Justice, and Justices White and O'Connor).

Petitioners submit that it is obvious that Piesco's comments had a detrimental impact on her working relationships, and that the Court of Appeals' requirement that petitioners must submit evidence of actual disruption beyond that showing is contrary to this Court's holding in Connick.

In sum, the Court of Appeals erred by not affording the petitioners' interest in maintaining the efficient operation of the Department any weight in the Pickering balance. Moreover, if the Court of Appeals



had applied the Pickering factors properly, the balance would have favored petitioners. Piesco's speech interest did not outweigh the Department's interest in insuring its efficient operation and thus, her termination did not violate her first amendment rights.

3. The Court of Appeals failed to consider the specific facts of this case in applying the qualified immunity doctrine.

Petitioners Ortiz and LaPorte are immune from liability since their actions in terminating Piesco did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The Court of Appeals, in denying petitioners immunity, did not inquire whether at the time of Piesco's termination the law was clearly established in relation to the specific facts of this case. Instead, the

Court simply reasoned that "Piesco's statements [were] of such clear public concern that it would not be reasonable for Ortiz and LaPorte to conclude that it was lawful to discharge" her (A53). See also, Vasbinder v. Ambach, 926 F.2d 1333, 1340-1341 (2d Cir., 1991) (in first amendment case, court determined that the law was clearly established without considering the facts of the case).

The Second Circuit's application of the qualified immunity doctrine to Pickering type cases is inconsistent with decisions of other Circuits in which a fact-specific test for the application of the immunity doctrine has been formulated and applied. In Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), cert. den., 479 U.S. 848 (1986), the Seventh Circuit stated:

[T]here is one type of constitutional rule, namely that involving the balancing



of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the "law" can rarely be considered "clearly established." ... It would appear that whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability under [Harlow].

The Fifth and Tenth Circuits have also adopted a standard whereby the public employer is generally entitled to immunity unless the official was on notice from decisions in cases with analogous facts and in which the necessary Pickering balance had been performed. See, Noyola v. Texas

⁷ The Court noted, however, that immunity would be unavailable even in the absence of decisional law where the public employer's conduct was so egregious that "the result of the balancing test will be a foregone conclusion." 786 F.2d at 276, n.18.



Department of Human Resources, 846 F.2d 1021 (5th Cir., 1988); Melton v. City of Oklahoma City, 879 F.2d 706, reh. granted on other grounds, 888 F.2d 724 (10th Cir., 1989).

Petitioners in this case were not on notice in 1985 that Piesco's speech interest outweighed the Department's interest in ensuring its efficient operation and that therefore, her termination would be unlawful. See, Guercio v. Brody, 911 F.2d 1179, 1184 (6th Cir., 1990), cert. den., —U.S.—, 111 S.Ct. 1681 (1991) (the relevant inquiry is not whether the Pickering balance was clearly established, but whether the employee's rights under the Pickering balance were clearly established).

Petitioners are aware of only one other case involving the application of the Pickering balance to a termination of an employee for legislative testimony. Patteson

v. Johnson, 787 F.2d 1245 (8th Cir.), cert. den., 479 U.S. 828 (1986). Although the balance was struck in the employee's favor in that case, it did not put petitioners on notice with respect to Plesco's termination. First, the decision of the Court of Appeals was not decided until after Plesco's termination (the District Court case is unreported). Moreover, the comments of the Deputy State Auditor did not have any disruptive effect because his relationship with the State Auditor in Patteson was already strained.

Finally, in Patteson, although the Court determined that the employee's first amendment rights had been violated, it found that the State Auditor was entitled to qualified immunity because the law was not clearly established at the time of the employee's termination.

Similarly, in this case, since it was not clearly established at the time of Plesco's termination that her discharge would violate her first amendment rights, Ortiz and LaPorte are entitled to qualified immunity.

CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Corporation Counsel of the
City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
PAUL MARKS,
FAY S. NG,
of Counsel.

*Counsel of Record.

91-359

Supreme Court, U.S.
FILED

AUG 30 1991

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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF NEW YORK, DEPARTMENT OF
PERSONNEL, JUAN ORTIZ, AND NICHOLAS
LA PORTE, JR.,

Petitioners,

-against-

DR. JUDITH PIESCO,

Respondent.

APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August 28, 1991.

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DECISION OF THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT,
DATED JUNE 3, 1991

DR. JUDITH PIESCO,

Appellant,

-v.-

THE CITY OF NEW YORK, DEPT. OF
PERSONNEL, JUAN ORTIZ and NICHOLAS
LAPORTE, JR.,

Appellees.

Before:

TIMBERS, MESKILL AND PRATT,

Circuit Judges.

Appeal from a summary judgment entered December 26, 1990, in the Southern District of New York, John S. Martin, Jr., District Judge, dismissing appellant's civil rights action and pendent state law claims.

Reversed and remanded in part; affirmed in part.



RONALD PODOLSKY, New York, N.Y. for
appellant Dr. Judith Plesco.
FAY S. NG, New York, N.Y. (Victor A. Kovner,
Corporation Counsel of the City of
New York, Pamela Seider Dolgow and
Paul Marks, N.Y., on the brief) for
appellees City of New York, Dept. of
Personnel, Juan Ortiz and Nicholas
LaPorte, Jr.

TIMBERS, CIRCUIT JUDGE:

Appellant Dr. Judith Plesco appeals from a summary judgment in favor of appellees the City of New York, Department of Personnel (DOP or the City), Juan Ortiz and Nicholas LaPorte, Jr. entered December 26, 1990 in the Southern District of New York, John S. Martin Jr., *District Judge*, dismissing appellant's civil rights action and pendent state law claims.

The chief issue pressed on appeal is whether the district court erred in dismissing appellant's first amendment claim. In asserting her claims of error, Dr. Plesco advances two principal contentions: (1) the



district court improperly concluded that DOP's interest as an employer outweighed Dr. Piesco's first amendment interest in truthfully testifying before a legislative committee; and (2) since certain factual issues were unresolved, it was neither appropriate to consider conduct, other than her testimony before the committee, as a basis for the alleged retaliation, nor proper to conclude that her testimony was irresponsible as a matter of law.

A subordinate issue pressed on appeal by appellant is that appellees Ortiz and LaPorte are not immune from suit under 42 U.S.C. § 1983 (1988).

For the reasons which follow, we reverse that part of the judgment dismissing Dr. Piesco's first amendment claim. We affirm the dismissal of the pendent state law

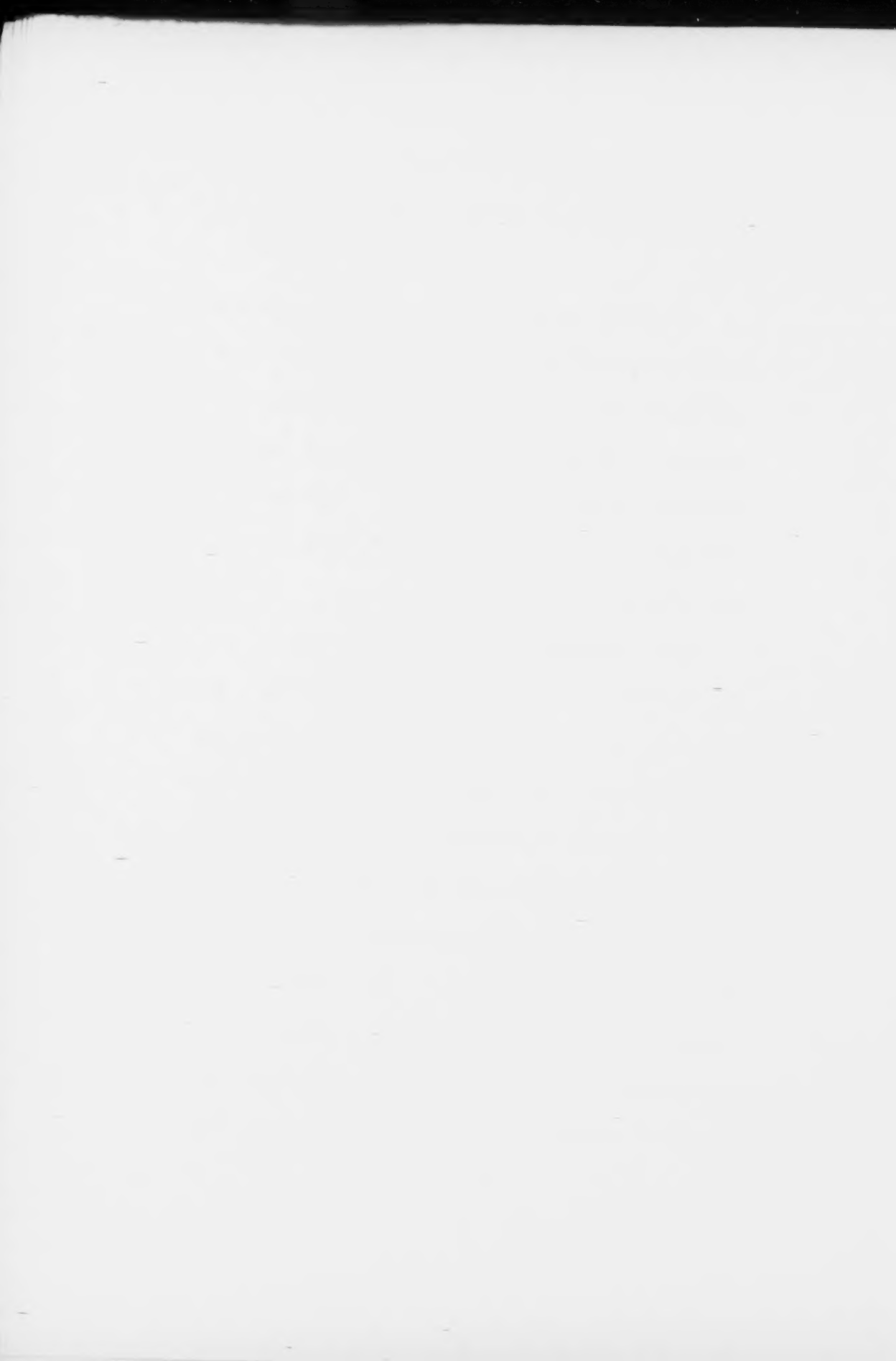


claims and the constitutional claims other than the first amendment claim.

I.

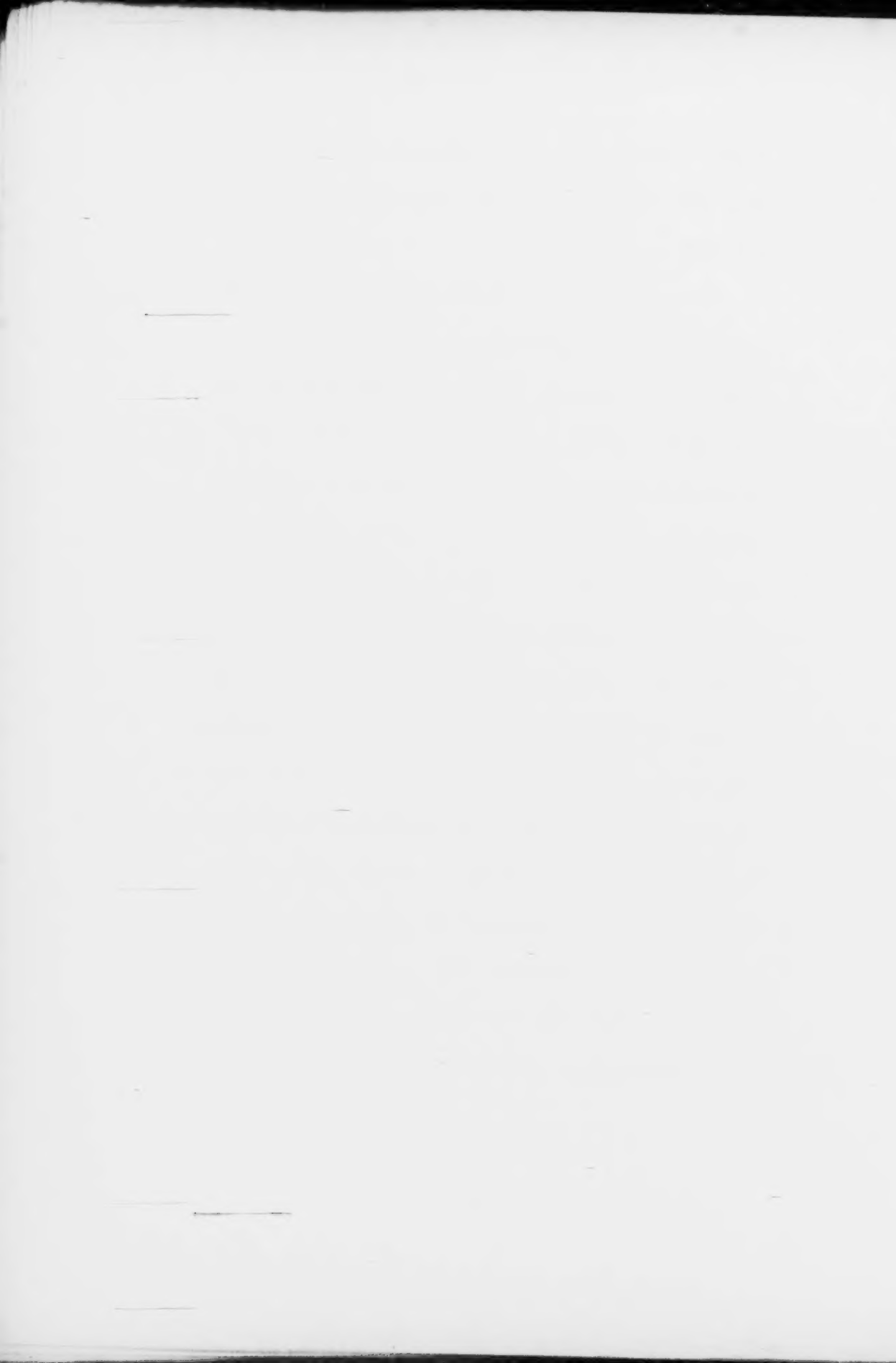
We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal. Since this is an appeal from a summary judgment, we review the facts in the light most favorable to the non-movant, Dr. Piesco.

In September 1982, Dr. Piesco was appointed on a provisional basis to the position of Deputy Personnel Director for Examinations in the New York City Department of Personnel. In that capacity, she was responsible for the administration of the Bureau of Examinations, the largest bureau within DOP. The Bureau of Examinations is charged with the preparation, evaluation and administration of all civil service tests for the City of New



York. During Dr. Plesco's tenure at DOP, the size of her staff fluctuated between 175-200 employees.

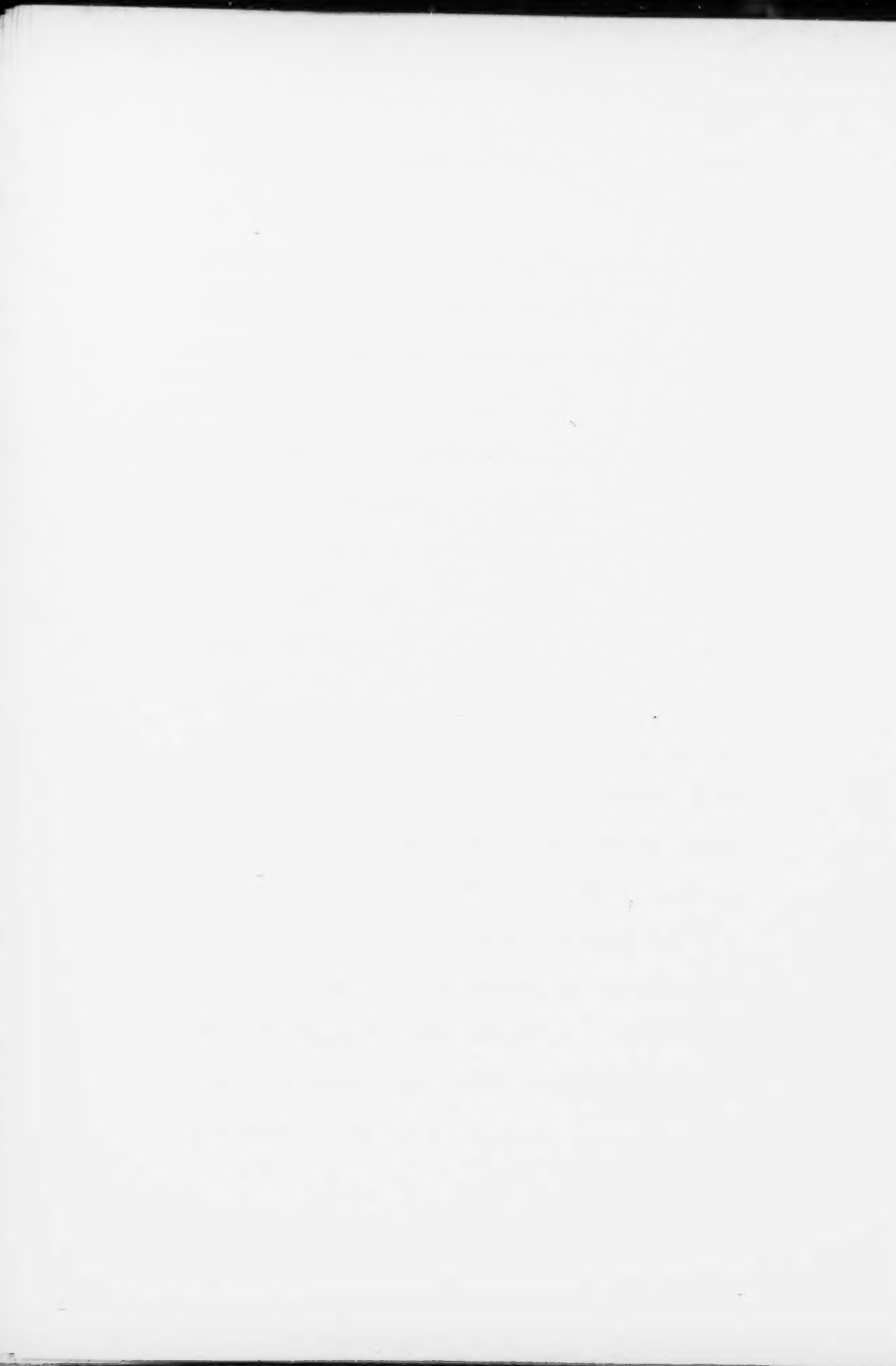
In December 1984, New York City administered examination no. 4061 for the position of police officer. Thereafter, in February 1985, Dr. Plesco and other administrators met to establish a passing grade for examination no. 4061. At that meeting, Police Department personnel advocated adopting a passing grade of 82, while Dr. Plesco urged that the passing grade be set at 89. Ortiz, then Personnel Director, ultimately decided to set the passing grade at 85. By setting the passing grade at that level, each successful candidate was required to answer correctly 119 of the exam's 140 questions. By contrast, had the passing grade been set at 89, successful candidates would have been



required to answer at least 125 questions correctly.

In June 1985, Dr. Plesco and appellees Ortiz and LaPorte (the latter then being First Deputy Personnel Director) met with members of the New York State Senate Committee on Investigations, Taxation, and Government Operations (Committee). The Committee was conducting a review of the management of the New York City Police Department. While it is unclear who first used the word "moron", Dr. Plesco responded affirmatively when asked by a staff member whether it was possible for a moron to pass the police examination with the passing grade set at 85.

On July 11, 1985, Dr. Plesco and Ortiz appeared at a public hearing held by the Committee. Although not subpoenaed, the record indicates that the Deputy Chief Investigative Counsel for the Committee



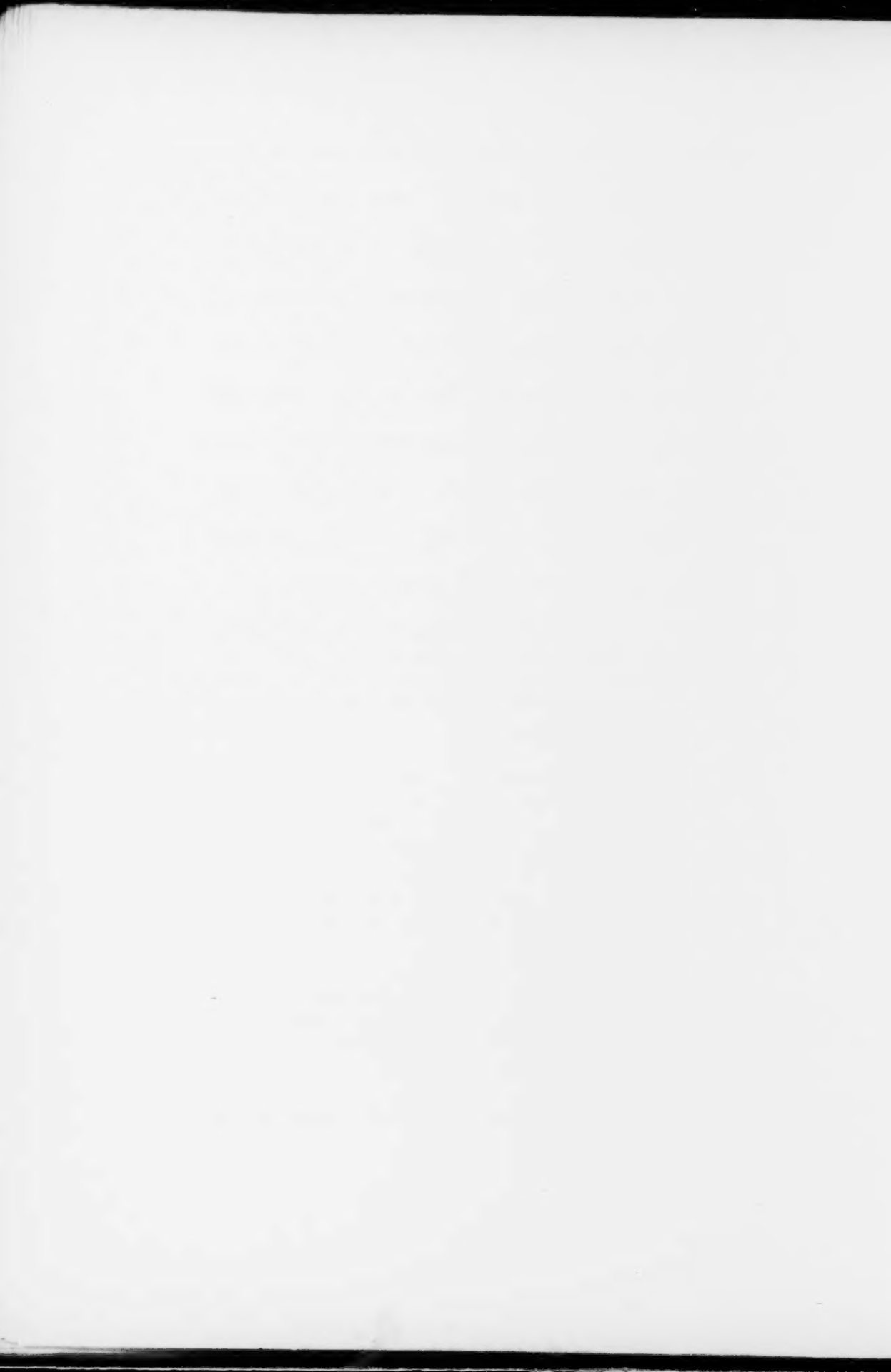
contacted Ortiz and informed him that if Dr. Piesco did not appear she would be subpoenaed. The transcript of the hearing reveals that Senator Goodman, Chairman of the Committee, rejected Ortiz' request to be the sole spokesperson for DOP. Senator Goodman specifically requested that Dr. Piesco "testify directly". After she was duly sworn, the following colloquy ensued between Senator Goodman and Dr. Piesco:

SENATOR GOODMAN: Is it not a fact that under questioning by this Commission['s] staff you indicated that the written exam was so easy "that a moron could pass"?

DR. PIESCO: The conversation that we had was a very informal conversation, and if I used it as [a] characterization, I think it was rather unfortunate[.] I was not obviously aware of the [sic] that the conversation which was informal was in the way of cross examination.

I certainly would have modified my statement merely because the term "moron" is rather offensive and has certain technical meanings.

The answer to your question is yes.



.

SENATOR GOODMAN: Would a functional illiterate pass the functional portion in the police academy?

[Although there exists some confusion concerning whether this question was correctly transcribed, it apparently is not disputed that the question posed to Dr. Piesco was "[w]ould a functional illiterate pass the entrance examination to the police academy?"]

DR. PIESCO: At the pass mark that is set, I would say that it is possible.

On July 12, 1985, one day following Dr. Piesco's testimony before the Committee, Ortiz wrote a memorandum to Mayor Koch detailing events leading up to Dr. Piesco's appearance before the Committee. Ortiz enumerated factors that were considered in setting the passing grade for examination no. 4061: (1) insuring the quality of police officers; (2) providing the Police Department, over the life of the eligible list, with a sufficient number of candidates to fulfill its hiring needs; (3) recognition that



the test was only the first of several screening devices in the process of recruiting and training police officers, i.e., all candidates who passed the test also would have to pass the rigorous curriculum at the Police Academy and the Department's 18-month probationary period, as well as psychological, character, physical and medical screening; and (4) the mandate of Title VII, 42 U.S.C. §2000e, *et seq.* (1988), to minimize disparate impact on minority candidates. Ortiz explained to the mayor that the difference between the passing score advocated by Dr. Piesco and that ultimately established is "six items out of a 140 question test". In a misleading characterization of Dr. Piesco's testimony before the Committee, Ortiz stated that "to call any successful candidate a 'moron' or a 'functional illiterate', is irresponsible because it is without basis in fact".



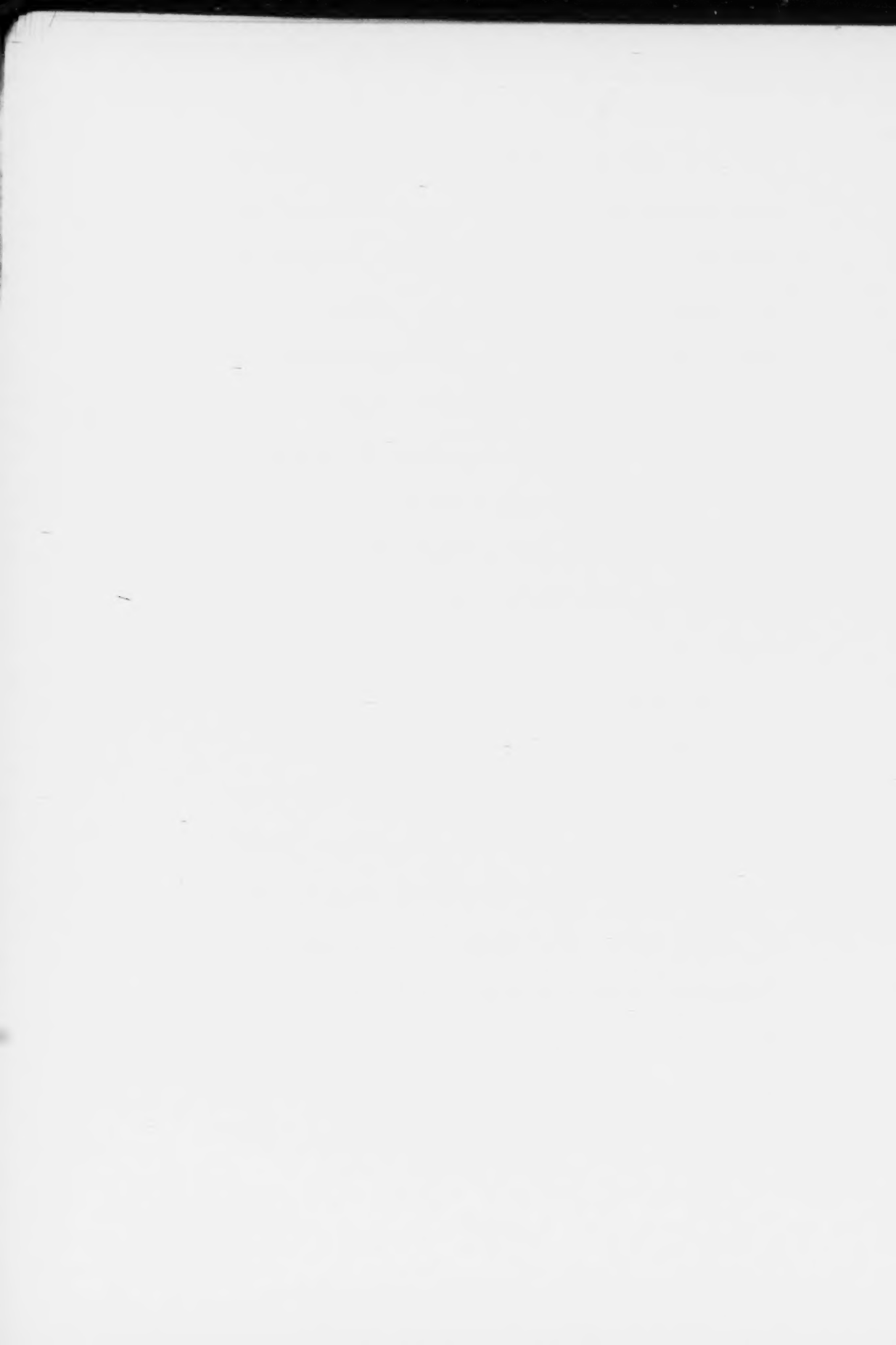
On July 13, 1985, just two days after Dr. Plesco's testimony, the *New York Post* carried an article quoting Ortiz as stating that "I believe her statement is irresponsible. Whether that merits any action at this point--I haven't addressed the issue." The *New York Post* reported that Ortiz "hinted [that] he may fire [Dr. Plesco]." Dr. Plesco refused the request of the *New York Post* to respond to Ortiz' statements.

On July 31, 1985, a meeting was held at DOP concerning examination no. 4061. Dr. Plesco, Ortiz, LaPorte, DOP's General Counsel Arthur Friedman, and its Deputy General Counsel Michael Rabin attended this meeting. On August 2, 1985, Ortiz in an intradepartmental memorandum reprimanded Dr. Plesco for her actions at this meeting. The memorandum reflected that during the course of the meeting Ortiz asked Dr. Plesco



why she had not reviewed the test before it was administered. Dr. Piesco responded by standing up, pointing her finger at Ortiz in an aggressive manner and yelling, "you don't know a fucking thing about testing. I am fed up with your bullshit and inaptitude." Ortiz then asked appellant to calm down and conduct herself in a civil manner, to which she replied, "I don't have to do a fucking thing, why don't you fire me?".

On August 13, 1985, appellant received two performance evaluations from LaPorte. For the period July 1, 1983 through June 30, 1984, appellant received a "very good" overall rating. For the period July 1, 1984 through June 30, 1985, she received a "marginal" overall rating. These evaluations were in marked contrast to earlier evaluations and statements from her superiors. For the period 1982-83, Dr.



Plesco received an overall evaluation of "outstanding". In a memorandum to Dr. Plesco dated March 21, 1983, Ortiz congratulated Dr. Plesco on her "outstanding performance". He noted that Dr. Plesco was one of a small number of DOP managers who received a 10 percent salary adjustment and was "indeed an asset to the agency". In a letter dated July 15, 1983, Ortiz authorized another salary increase for Dr. Plesco "[i]n recognition of [her] tireless efforts towards excellence and [her] professional dedication". After receiving the evaluations of August 13, 1985, Dr. Plesco claimed that Ortiz and LaPorte had retaliated against her for making statements to the Committee. Specifically, Dr. Plesco asserted various acts of retaliation: (1) she received two performance evaluations which improperly criticized her professional conduct; (2) a letter was placed in her personnel file



criticizing her behavior at the July 31, 1985, meeting; and (3) she was excluded from two meetings with Commissioners from other agencies.

Sometime thereafter, the New York City Department of Investigation (DOI) conducted a probe of Dr. Piesco's allegations. On December 5, 1985, prior to the firing of Dr. Piesco, DOI concluded that the 1983-85 performance evaluations were improperly prepared to highlight criticism of her conduct. Ortiz and LaPorte had changed key responsibilities and performance expectations in violation of DOP's handbook, *Guidelines for Evaluating Managerial Performance in New York City*. DOI found that "[t]his treatment resulted, in part, from her testimony at the Goodman hearing". It recommended that Dr. Piesco receive new performance evaluations. DOI also found that there was no retaliatory motive for



excluding Dr. Plesco from certain meetings and there was insufficient proof that placing the letter of reprimand in Dr. Plesco's personnel file was a retaliatory act.

In early December 1985, NBC contacted DOP requesting that Dr. Plesco speak to NBC on the subject of examinations in general. On December 9, 1985, Ortiz informed Dr. Plesco that she could not speak to NBC. Instead, Ortiz chose another DOP representative to be interviewed.

On December 19, 1985, Dr. Plesco commenced the instant action pursuant to 42 U.S.C. § 1983, alleging that DOP, Ortiz and LaPorte violated her first, fourth, fifth and fourteenth amendment rights. With reference to her first amendment claim, Dr. Plesco alleged that Ortiz and LaPorte retaliated against her for testifying before the Committee. She also alleged various state law claims. Eight days later, on December



27, 1985, appellant was terminated from her position at DOP.

Subsequent to DOI's investigation, Senator Goodman's Committee launched a probe of Dr. Plesco's firing. On June 24, 1986, the Committee published a report on the firing of Dr. Plesco which concluded that she was discharged "in significant measure because of her testimony before the Committee and the wide attention it received in the media." The Committee further stated that "[f]ollowing Dr. Plesco's testimony before the Committee, Mr. Ortiz evidently set about to build a retroactive case against her to justify her dismissal." Commenting on the ramifications of Dr. Plesco's firing, the Committee found that "the way in which this matter was handled by the city could have a chilling effect on future testimony about the operations of government." The report also indicated that shortly after Dr.

Piesco's testimony, Senator Goodman took certain steps to prevent retaliation against Dr. Piesco: "First, he telephoned Deputy Mayor Stanley Breznoff in July 1985 . . . to ask him to use his good offices to prevent retaliation against Piesco. Second, Goodman on three occasions urged the City's Corporation Counsel, Frederick A. O. Schwartz, Jr., to seek the cooperation of City Hall in finding some suitable position for Dr. Piesco."

In June 1987, Dr. Piesco filed an amended complaint which added a count for wrongful discharge. She also amended her original complaint to include Mayor Koch as a defendant. (By stipulation dated July 17, 1990, Dr. Piesco discontinued her action against Mayor Koch.)

On March 30, 1990, defendants filed a motion for summary judgment seeking dismissal of all of Dr. Piesco's claims. The



motion initially came before Judge Edelstein. In an order dated May 18, 1990, he concluded that, because "there are material issues of fact, defendants' motion for summary judgment is denied."

The case subsequently was reassigned to Judge Martin. On August 14, 1990, the court granted defendants' motion for reconsideration of their summary judgment motion. Thereafter, in an opinion dated December 18, 1990, the district court granted defendants' motion for summary judgment and dismissed the complaint. The court held that, under the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the City's interest, as an employer, in promoting the efficiency of the public services it performs outweighed plaintiff's interest, as a citizen, in speaking out on matters of public concern before a Senate Committee.



Accordingly, it dismissed appellant's first amendment claim.

As an alternate ground for dismissing the first amendment claim, the court found that appellant's outburst of expletives at the meeting of July 31, 1985, certainly tipped the *Pickering* balance toward defendants. The court also concluded that, even if it had not held that the *Pickering* balance tipped in favor of the defendants, qualified immunity protected defendants Ortiz and LaPorte from suit.

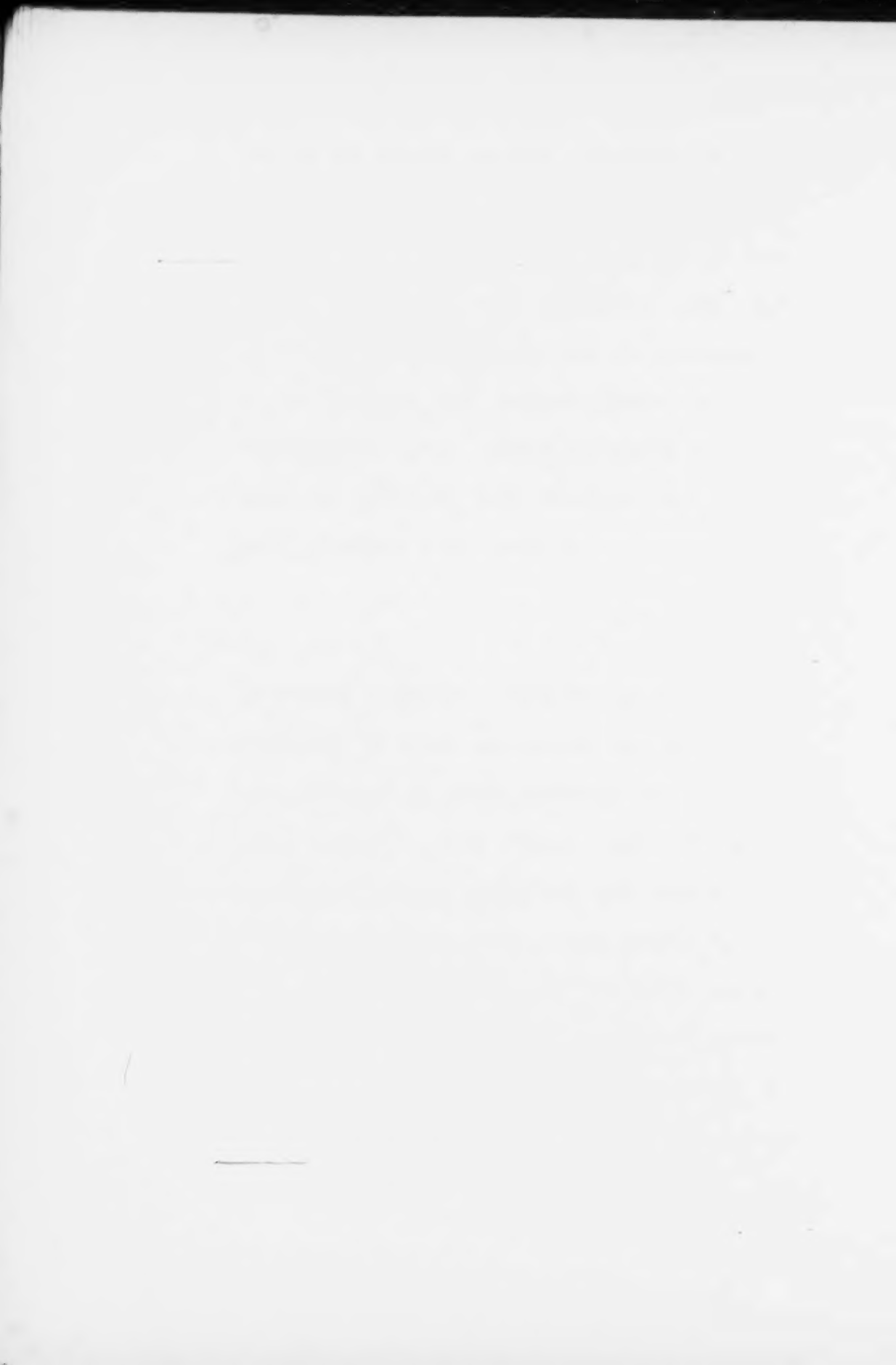
The pendent state law claims and remaining constitutional claims also were dismissed. Dr. Piesco does not press specific challenges on appeal to the dismissal of those claims. We therefore affirm their dismissal.

On appeal, appellant chiefly contends that the district court erred in dismissing her first amendment claim. She contends

that the *Pickering* balance should tip in her favor since her statements were made under oath in the context of a legislative hearing. She also contends that statements made subsequent to her testimony raise questions of fact which cannot be decided on a summary judgment motion. As a subordinate issue, she contends that qualified immunity does not insulate Ortiz and LaPorte from suit.

II.

On an appeal from a summary judgment, we review the record de novo to determine whether any genuine issue of material fact remained for trial and whether the substantive law had been applied correctly. *Inland Cities Exp., Inc. v. Diamond Nat'l Corp.*, 524 F.2d 753, 754 (9 Cir. 1975). We assess the record in the light most favorable to the party opposing summary judgment and draw all reasonable inferences in her favor.



Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465, (2 Cir. 1989). "[T]he party who defended against the motion for summary judgment . . . will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant." 10 Wright, Miller & Kane, Federal Practice and Procedure § 2716 (1983) (footnote omitted); see also *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Ambook Enter. v. Time Inc.*, 612 F.2d 604, 611 & n.8 (2 Cir. 1979), cert. dismissed, 448 U.S. 914 (1980).

III.

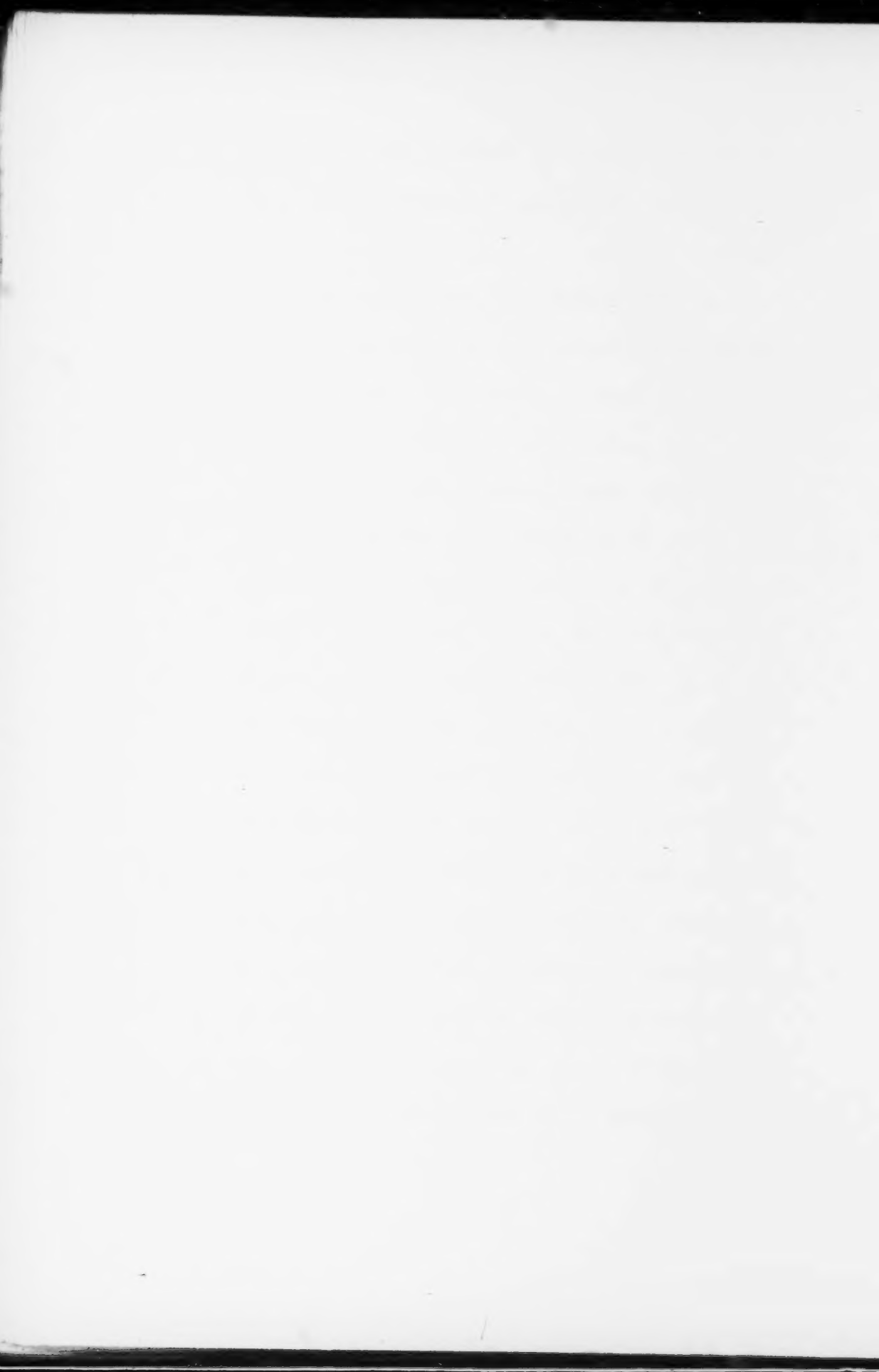
(A)

We turn first to Dr. Plesco's contention that the district court erred in granting summary judgment in favor of the City on her first amendment claim. She contends that the court erred in not according significant weight to her interest in



truthfully testifying before the Committee under the *Pickering* balancing test. We agree.

In considering this contention, we need decide only whether, as a matter of law, Dr. Plesco's first amendment interest in testifying before the Committee outweighed the City's countervailing interest, as an employer, in promoting the efficiency of the services it performs. Such determinations are questions of law. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Since this is an appeal from summary judgment, we take as true Dr. Plesco's allegation that the City's retaliatory actions were precipitated by her testimony before the Committee. We therefore do not address whether her subsequent actions, including use of expletives at a DOP meeting, constituted an independent basis sufficient to justify the City's actions. We agree with other courts



which have held that "summary judgment is inappropriate when 'questions of motive predominate in the inquiry about how big a role the protected behavior played in' the employment decision." *Peacock v. Duval*, 694 F.2d 644, 646 (9 Cir. 1982) (quoting *Mabey v. Reagan*, 537 F.2d 1036, 1045 (9 Cir. 1976)); accord *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104, 1108-09 (7 Cir. 1979); *Wilderman v. Nelson*, 467 F.2d 1173, 1176-77 (8 Cir. 1972). "Without a searching inquiry into these motives, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of *post hoc* rationalizations." *Peacock, supra*, 694 F.2d at 646.

Likewise, we decline to decide whether Dr. Plesco honestly believed that it was possible for a functional illiterate to pass the police examination at the level established by



the City. Reviewing Dr. Plesco's affidavit opposing summary judgment and her brief on appeal, it is apparent, even at this juncture, that she believes in the veracity of her testimony before the Committee. Moreover, unlike the district court, we do not summarily discount the significance between the passing score advocated by Dr. Plesco, 89, and the score set by DOP, 85. Although it is true that the difference between the two scores would mean only that a successful candidate would have to answer six additional questions correctly, a study of the record reveals that eighteen percent of those who took the test failed to do so. Since such a significant percentage failed to answer those additional questions correctly, we fail to see how that statistic clearly undermines the veracity of Dr. Plesco's testimony. In any event, whether a functional illiterate could pass the police



examination presents a material factual question which is disputed by the parties. Summary judgment is an inappropriate vehicle to resolve such factual issues.

(B)

It is well settled that persons do not relinquish their first amendment rights to comment on matters of public interest by becoming government employees. *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Connick, supra*, 461 U.S. at 140; *Pickering, supra*, 391 U.S. at 568. It also has been recognized that the government has a legitimate interest in regulating the speech of its employees that differs significantly from its interest in regulating the speech of people in general. *Id.* In *Pickering*, the Supreme Court attempted to strike a balance between these interests, in holding that the scope of a public employee's first amendment rights must be determined by balancing the



public employee's rights "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

"The threshold question in applying this balancing test is whether [a public employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.'" *Rankin, supra*, 483 U.S. at 384 (quoting *Connick, supra*, 461 U.S. at 146). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick, supra*, 461 U.S. at 147-48. When it has been determined that a statement touches upon a matter of public concern, we then balance the often competing interests of

employer and employee. The statement at issue will "not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin, supra*, 483 U.S. at 388; *Connick, supra*, 461 U.S. at 152-53. Other relevant considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin, supra*, 483 U.S. at 388.

Applying the *Pickering* balancing test to the instant case, the district court concluded that as a matter of law "the City's interest, as an employer, in promoting the efficiency of the public services it performs outweighed

[Dr. Plesco's] interest, as a citizen, in speaking out on matters of public concern." In reaching this conclusion, the court first acknowledged that Dr. Plesco's statements to the Committee "were clearly of public concern". While recognizing that Dr. Plesco was required to testify truthfully before the Committee and that she had a right to express her views on the appropriateness of selecting a passing grade of 85 for the police examination, the court attached considerable significance to the fact that Dr. Plesco's comments were made "in the emotionally charged atmosphere of public debate on the minority hiring policies of the New York City Police Department." The court cited *Guardians Ass'n of New York City Police Dep't v. Civil Service Comm'n of New York*, 633 F.2d 232 (2 Cir. 1980), *aff'd*, 463 U.S. 582 (1983), *cert. denied*, 463 U.S. 1228 (1983), which held that a previous written

test used by the City to screen applicants for the position of police officer was not job related and had a disparate impact on minority members. Relying on that case, the court concluded that "the appropriateness of an 85% passing mark was one of important concern to the senior members of the City's administration, including the leaders of the Police Department and [Dr. Piesco's] superiors in the Department of Personnel."

Since Dr. Piesco was aware that selecting a passing grade of 85 minimized the disparate impact of examination no. 4061 and that the established passing grade was of significant concern to the leaders of the Police Department and her own superiors at DOP, the court found that she "had the obligation to insure that her comments accurately reflected legitimate concerns, did not exacerbate unnecessarily a sensitive public issue and did not unfairly undermine

the judgment made by her superiors and the senior officials of the Police Department." Having attached those constraints on Dr. Plesco's right to comment on matters of public concern, it was not difficult for the court to conclude that Dr. Plesco's statements in private and public meetings with the Committee were "inappropriate and irresponsible". The court suggested that the appropriate course was for Dr. Plesco to "amplify[] her testimony to indicate how extremely remote that possibility was." Concluding that the City was justified in terminating Dr. Plesco, the court granted summary judgment in favor of the defendants on the first amendment claim.

In reviewing Dr. Plesco's claims of error, "'we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a

character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'" *Connick, supra*, 461 U.S. at 150 n.10 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). The Supreme Court has recognized that one of the critical purposes of the first amendment is to provide society with a basis to make informed decisions about the government. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, *the manner in which government is operated or should be operated*, and all such matters relating to political processes."

Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (emphasis added). Indeed, the first amendment guarantees that debate on public

issues is "uninhibited, robust, and wide open". *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "In short, speech on matters of public concern is that speech which lies 'at the heart of the First Amendment's protection'". *Rankin, supra*, 483 U.S. at 395 (Scalia, J., dissenting) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

Here, Dr. Piesco's statements addressed the employment policies of the New York City Police Department. Specifically, her testimony enlightened members of the state legislature, and indeed the public, on the level of education and intellectual capacity required to satisfy the threshold requirement for becoming a police officer. The implications of her testimony are far reaching in light of the tremendous powers vested in police officers. Since the police officer

represents the most basic unit of government, one which arguably most affects the day-to-day lives of the citizenry, Dr. Plesco's testimony concerning the competency required to become a police officer clearly is a matter of public concern. Based on the nature of her testimony, it also is apparent that this case can be readily distinguished from those cases where a disgruntled employee voluntarily comments on an employment-related matter out of a personal interest. *E.g.*, *Connick, supra*, 461 U.S. at 148; *Barkoo v. Melby*, 901 F.2d 613, 618-20 (7 Cir. 1990); *McEvoy v. Shoemaker*, 882 F.2d 463, 466-67 (10 Cir. 1989).

Having found that Dr. Plesco's testimony addressed matters of public concern, we also find that it should be accorded significant weight in the *Pickering* balance. This conclusion is buttressed by our prior decisions. We recently held that

allegations of fraud, theft, and misallocation of public funds made to the FBI were matters of serious concern and as such were entitled to "greater weight" in the *Pickering* balance. *Vasbinder v. Ambach*, 926 F.2d 1333, 1339-40 (2 Cir. 1991); see also *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 46 (2 Cir. 1983) (complaint of fraudulent and corrupt practices carries great weight). At the minimum, we consider Dr. Piesco's statements before the Committee to carry the same weight in the *Pickering* balance as allegations of unlawful conduct. Speech critical of the government is precisely the kind of speech the first amendment was designed to protect. Contrary to appellees' contention, we conclude that Dr. Piesco's testimony substantially involved matters of public concern and was entitled to great weight in the *Pickering* balancing test.

Although the district court acknowledged that Dr. Plesco's testimony was "clearly of public concern", there is no indication that it accorded significant weight to her interest in testifying before the Committee in its balancing of interests. Instead, it attached considerable significance to the nature of Dr. Plesco's comments and her senior position at DOP. We agree that these are relevant considerations in the *Pickering* balance. On the facts of the instant case, however, we reject the contention that these factors outweigh Dr. Plesco's interest in testifying truthfully before a legislative committee. We find that the burden of caution a high ranking official such as Dr. Plesco normally bears when commenting on organizational matters is mitigated by the necessity for candor in the legislative forum. We are aware of only one case that acknowledges the exceptional

significance of a government employee's interest in testifying truthfully before a legislative committee.

In *Patteson v. Johnson*, 721 F.2d 228, 231-33 (8 Cir. 1983), a case factually analogous to the instant one, the court recognized the plaintiff's interest in testifying about pending legislation before a legislative committee and in responding to questions posed by state senators. Concluding that testimony before a legislative committee touched upon issues of significant public concern, the court directed that "special attention" be given to the nature of plaintiff's speech on remand. *Id.* at 232-33. The court articulated the proper balancing of interests when a public employee testifies before a legislative committee: "the disruptive effect of [plaintiff's] legislative testimony upon the employment relationship [should be weighed] against [plaintiff's]

right to testify upon pending legislation, his obligation to respond truthfully to legislative questioning, the public interest relating to the matter in controversy, and whether or not it was essential that [plaintiff] speak out . . . without fear of retaliatory dismissal." *Id.* at 233. Applying these factors on remand, the district court concluded that the plaintiff's interest in testifying before the legislative committee outweighed the state's countervailing interest. *Patteson v. Johnson*, 787 F.2d 1245, 1248 (8 Cir.) (discussing district court's opinion with approval), *cert. denied*, 479 U.S. 828 (1986). The district court reasoned that "[a]s a citizen . . . [plaintiff] had a legitimate and substantial interest in speaking his support for the proposed legislation and to speak truthfully in direct response to questions" *Id.* (quoting district court's memorandum decision). The

district court added that plaintiff's testimony was "a matter of *substantial* public concern." *Id.* (emphasis added).

On the peculiar facts of the instant case, we conclude that Dr. Piesco's right to give truthful answers before the Committee takes precedence over the City's interest in efficiently performing government services. While not subpoenaed to testify, it was apparent that Dr. Piesco would have been compelled to appear had she declined the Committee's invitation. Dr. Piesco's comments were made while under oath before a legislative committee. She responded to a direct question by Senator Goodman in the manner contemplated. Her testimony related to matters of significant public interest and, in view of her senior position at DOP's Bureau of Examinations, she was uniquely qualified to comment on the police examination. Dr. Piesco was not simply a

test scorer or proctor charged with the responsibility for monitoring the exams; her duties were much more comprehensive. She had expertise in the area of examinations. It is for this reason that the Committee sought her testimony. Finally, Dr. Piesco's superior, Juan Ortiz, sat next to her during her testimony, and there is no indication in the record that he counseled her to elaborate on her testimony.

While we acknowledge that Dr. Piesco's statements to the Committee tangentially touched on the sensitive area of minority recruitment, we do not read the first amendment as requiring one to shade her testimony before a legislative committee so as not to "exacerbate" a sensitive public issue. When responding to a question under oath, absent some valid privilege, a person has one obligation under law - to answer

honestly. N.Y. Penal Law §210.00-.50
(McKinney 1988).

The need for honest and candid testimony takes on added significance when one appears before a legislative committee conducting an investigation. The Supreme Court has recognized that "the power of inquiry -- with the process to enforce it -- is an essential and appropriate auxiliary to the legislative function". [*McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)]. "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information -- which not infrequently is true -- recourse must be had to others who do possess it." *Id.* at 175. Although the Court was referring to the investigative powers of

Congress, it cited with approval various state authorities which stand for the proposition that state legislatures possess identical investigative authority. *Id.* at 165-67; see also *Keeler v. McDonald*, 99 N.Y. 463, 482-83 (1885) (provision authorizing state legislative committees to take testimony and summon witnesses may be "indispensable to intelligent and effectual legislation"). Indeed, the power to secure needed information by investigation "has long been treated as an attribute of the power to legislate", predating the enactment of the Constitution in both England and the United States. *Id.* at 161. Recognizing the importance of an enlightened legislature to our system of government, one commentator reached the inevitable conclusion that "[p]ublic policy requires that the [state legislature's investigative] power be broad because of the need for informed legislative

decisions." Vitiello, *The Power of State Legislatures to Subpoena Federal Officials*, 58 Tul. L. Rev. 548, 551 (1983). Requiring less than candor and honesty from witnesses appearing before legislative committees would undermine our system of government which is predicated on an informed and enlightened legislature. We decline to read into the first amendment a restriction which requires a person to temper testimony before a legislative committee so as not to "exacerbate" a sensitive issue.

We hold that the district court erred in failing to accord significant weight both to the inherent first amendment value of Dr. Piesco's testimony and to the forum in which it was elicited.

(C)

Having concluded that Dr. Piesco's testimony was entitled to great weight in the *Pickering* balancing test, we turn next to

the question of whether her statements undermined the efficiency of the services performed by DOP. In reviewing the harm caused by Dr. Plesco's statements, we are mindful that the burden is on the public employer to show that its interest in promoting the efficient performance of services outweighs the employee's speech interest. *Rankin, supra*, 483 U.S. at 388; *Vasbinder, supra*, 926 F.2d at 1339. The "burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick, supra*, 461 U.S. at 150.

In *Connick*, an assistant district attorney circulated a questionnaire in the office soliciting views of her fellow staff members on such topics as office policies, morale, level of confidence in superiors, and whether employees felt pressured to work in political campaigns. The Court first

concluded that the questionnaire addressed only matters of limited public concern. *Id.* at 148-49. In addressing the government's burden of demonstrating that the employee's statements undermined office relationships, the Court held that it was unnecessary for an employer "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action". *Id.* at 152. It therefore held that the District Attorney and his first assistant's unsupported claims, that the questionnaire interfered with working relationships, was sufficient to carry the government's burden of proof. *Id.* at 151-52. The Court emphasized, however, that where the employee's speech more substantially involved matters of public concern, a stronger showing by the government is required. *Id.* at 152. Consistent with that caveat, the Court held

in a subsequent case that an employee's first amendment rights must prevail in the balancing of interests where there is no evidence that the employee's statements interfered with the efficient functioning of the office. *Rankin, supra*, 483 U.S. at 388-89; *see also id.* at 393 n.* (Powell, J., concurring) ("[i]n this case, however, there is no objective evidence that [plaintiff's] lone comment had any negative effect on morale or efficiency of the Constable's office"); *American Postal Workers Union v. United States Postal Serv.*, 830 F.2d 294, 303-04 & n.12 (D.C. Cir. 1987) (official's opinion that speech interfered with efficient operation is insufficient to outweigh an employee's interest in speaking on a matter of public concern). Cf. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508 (1969) ("in our system, undifferentiated fear or apprehension of disturbance is not

enough to overcome the right to freedom of expression").

Where, as in the instant case, the employee's speech substantially involved matters of public concern, the government is required to make a stronger showing of interference with operations. *Connick, supra*, 461 U.S. at 152. Examining the record before us, we cannot conclude that Dr. Plesco's statements to the Committee undermined the effective and efficient operation of DOP. The record is devoid of any facts which demonstrate that Dr. Plesco's testimony either interfered with DOP's efficient functioning or impeded the proper performance of her daily duties. Neither Ortiz nor LaPorte has submitted affidavits explaining how their working relationship with Dr. Plesco was affected by her testimony or how the operations of DOP were disrupted. Moreover, unlike appellees,

we do not interpret Dr. Piesco's exclusion from meetings as demonstrating that work relationships were disrupted at DOP. Construing the facts most favorably to Dr. Piesco, her exclusion could be considered a further act of retaliation. Consistent with *Connick* and its progeny, we decline the government's invitation to presume that Dr. Piesco's speech was harmful to DOP's efficient functioning. Where the statements involved so clearly touch on matters of public concern, the government is required to demonstrate interference with the efficient functioning of the workplace. *Id.* We hold that the City has failed to carry its burden of proving harm to the efficient functioning of DOP.

As a final matter, we appreciate the potential ramifications of holding Dr. Piesco's testimony unprotected by the first amendment, as did the district court. A



government employee called to testify before a legislative committee about work-related matters would be confronted with a Hobson's choice. She could either (1) honestly answer the question, in which case, as a matter of law, she could be fired; (2) commit perjury; or (3) refuse to answer the question posed and be held in contempt, see N.Y. Penal Law §215.60(3) (McKinney 1988); *Lanza v. New York*, 370 U.S. 139 (1962) (upholding conviction for refusing to answer questions before a New York State legislative committee), *overruled on other grounds*, *Katz v. United States*, 389 U.S. 347 (1967). By offering a government employee the option of jail or unemployment, we would put our imprimatur on chilling speech in a forum where candor is critical to informed decision-making. This we decline to do. We consider it essential that a person in Dr. Plesco's circumstance be able to testify



before a legislative committee without fear of retaliation.

In light of both appellees' failure to demonstrate that Dr. Plesco's statements caused any harm to DOP or to intra-office work relationships and the court's failure to accord significant weight to Dr. Plesco's testimony before the Committee, we hold that the district court improperly balanced the *Pickering* factors. On this record, it was inappropriate to grant summary judgment in favor of appellees.

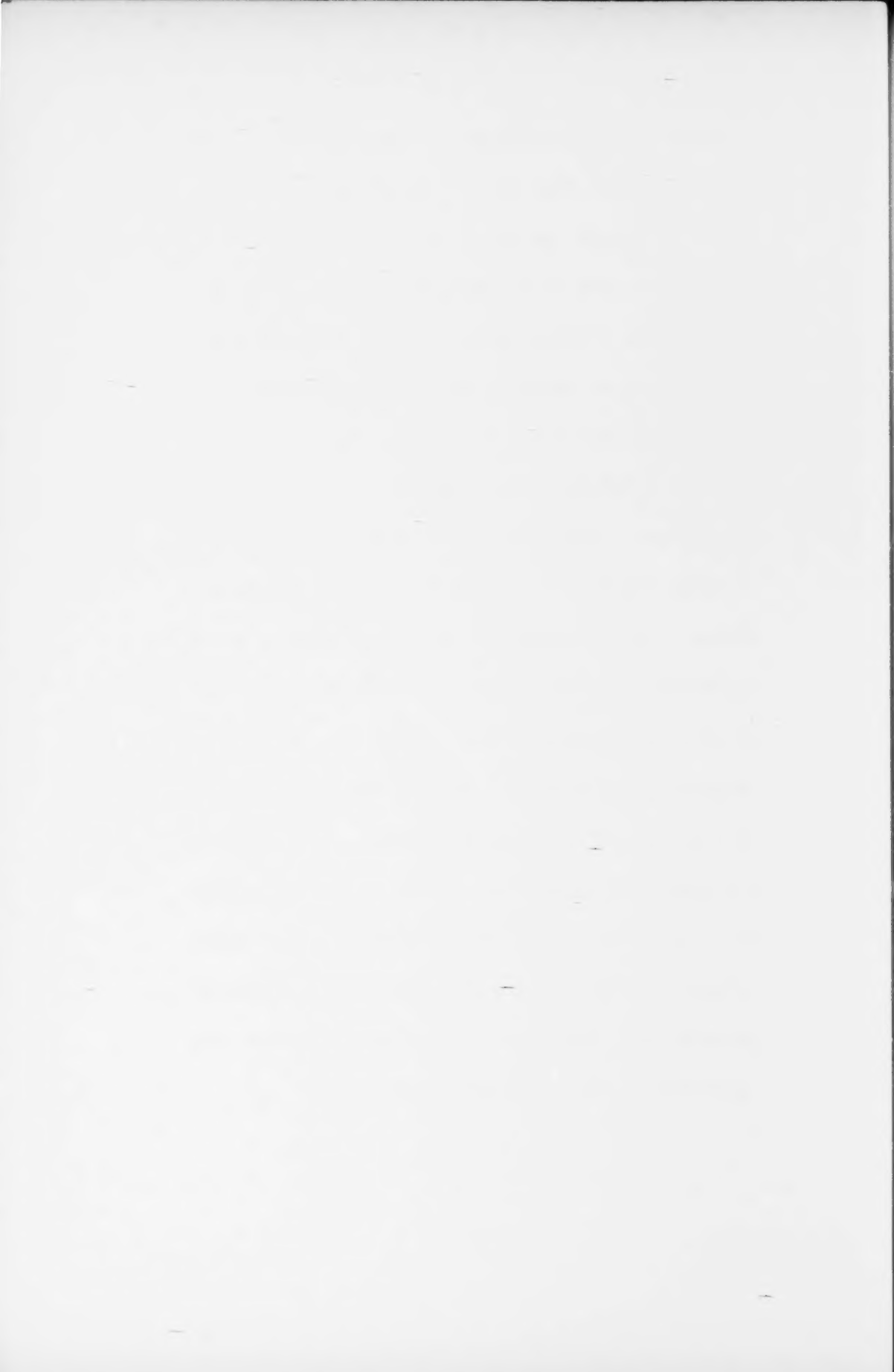
IV.

This brings us to the district court's holding that Ortiz and LaPorte are insulated from suit by the doctrine of qualified immunity.

The qualified immunity doctrine shields government officials performing discretionary functions from liability for civil damages insofar as their actions did not violate



"clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Even where the rights were clearly established, officials are immune if it was objectively reasonable for them to believe that their acts did not violate those rights. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). An official does not have immunity, however, where the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Id.* (citation omitted).

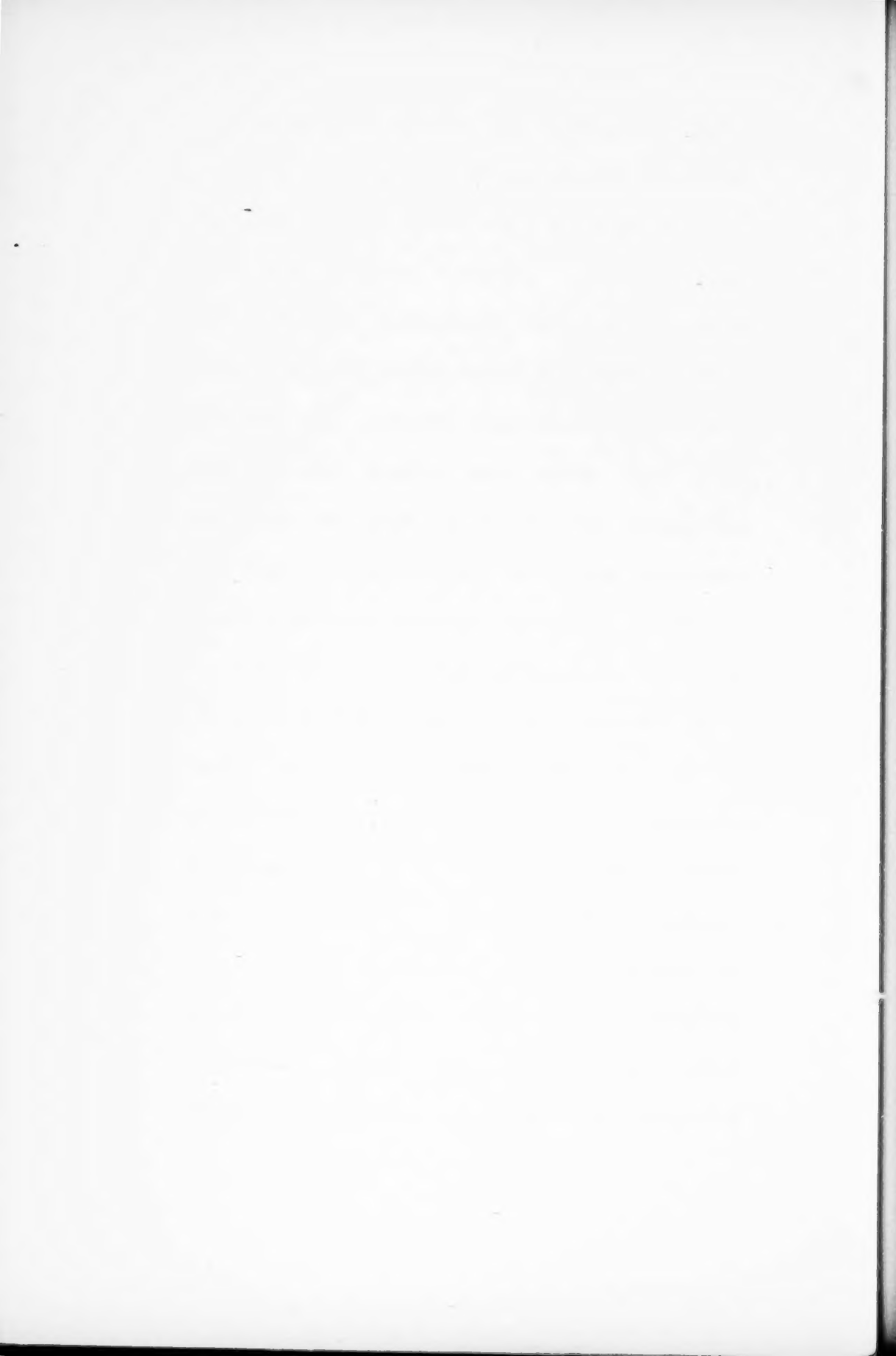


To determine whether it was objectively reasonable to conclude that retaliation was appropriate "will often require examination of information possessed" by the retaliating official. *Id.* at 641. The question we must answer therefore is whether a reasonable official would have believed that retaliation was lawful in light of clearly established law and information available to the retaliating official. *Id.* We reiterate that "[i]n the context of a summary judgment motion, we also must view the record most favorably to [Dr. Piesco], as the party opposing the motion, and 'accept [her] account of the reasons for [her] dismissal.'" *Giacalone v. Abrams*, 850 F.2d 79, 85 (2 Cir. 1988) (quoting *Hawkins v. Steingut*, 829 F.2d 317, 319 (2 Cir. 1987) (citation omitted)). As stated above, for the purpose of this appeal, it is assumed that Ortiz and LaPorte



retallated against Dr. Plesco because of her testimony before the Committee.

In light of the clear public interest value of Dr. Plesco's speech and the apparent lack of disruption at DOP, we conclude that the court erred in holding that Ortiz and LaPorte were immune. We consider this case much like others which have addressed an official's claim of qualified immunity where it was apparent that the individual retallated against was exercising his first amendment rights. In *Reuber v. Food Chemical News, Inc.*, 899 F.2d 271, 287-88 (4 Cir. 1990), *rev'd on other grounds*, 925 F.2d 703 (4 Cir. 1991) (en banc), the court held that the plaintiff's remarks which were critical of the government go "to the heart of the interests protected by the First Amendment, and the defendants could not have reasonably believed that they were acting within their



rights". *Id.* Similarly, in *Dobosz v. Walsh*, 892 F.2d 1135, 1141 (2 Cir. 1989), we held that a police officer "clearly was exercising his right to free speech" when he cooperated with the F.B.I. and testified in court against a fellow officer. "Because the proscription of retaliation for a plaintiff's exercise of First Amendment rights has long been established, ... we conclude[d] that [the superintendent of the police department was] not entitled to qualified immunity ..."
Id. at 1141-42.

Here, as in *Reuber* and *Dobosz*, we consider Dr. Plesco's statements of such clear public concern that it would not be reasonable for Ortiz and LaPorte to conclude that it was lawful to discharge or otherwise retaliate against Dr. Plesco. The claim of qualified immunity is further undercut by appellees' failure to present any evidence of harm resulting from Dr. Plesco's testimony.

Moreover, the DOI report which was released approximately three weeks prior to Dr. Piesco's dismissal put Ortiz and LaPorte on notice that their improperly prepared evaluation of Dr. Piesco was retaliatory in nature. In light of the DOI report, it is incomprehensible how Ortiz and LaPoarte reasonably could have considered their subsequent discharge of Dr. Piesco to be lawful.

We hold on the record before us that it was improper to conclude that Ortiz and LaPorte were immune.

V.

To summarize:

We hold that the district court erred in granting summary judgment in favor of appellees. First, the court improperly applied the *Pickering* balancing test. Although Dr. Piesco testified concerning matters of great public concern in a forum



where candor is critical, the court failed to attach significant weight to Dr. Piesco's testimony in the *Pickering* balancing test. Moreover, in light of the significant first amendment value of Dr. Piesco's speech, the court failed to hold the government to its standard of proving interference with DOP's efficient operations.

We further hold that the court erred in concluding that Ortiz and LaPorte were immune from suit. Since Dr. Piesco's testimony was of significant public concern and there was no evidence of disruption at DOP as a result of her comments, it was not reasonable for Ortiz and LaPorte to believe that their actions were lawful.

The judgment of the district court is reversed insofar as it dismissed Dr. Piesco's first amendment claim. We remand that claim for further proceedings not inconsistent with this opinion. We affirm the dismissal of the



pendent state law claims and the constitutional claims other than the first amendment claim.

Reversed and remanded in part;
affirmed in part.



DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK, DATED
DECEMBER 18, 1991

DR. JUDITH PIESCO,

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF
PERSONNEL, JUAN ORTIZ, NICHOLAS
LaPORTE, JR., and EDWARD I. KOCH,

Defendants.

MEMORANDUM OPINION

JOHN S. MARTIN, JR., District Judge

This matter is before the court on motion for summary judgment by the defendants. At issue is the claim of plaintiff, Dr. Judith Piesco, an at-will employee of the City of New York Department of Personnel, that she was improperly discharged from her position as Deputy Personnel Director for Examinations because of her exercise of First Amendment

rights in statements she made to the New York State Senate Committee on Investigation, Taxation and Government Operations (the "State Senate Committee"), in June and July of 1985.

In addition to her claim based upon the First Amendment, plaintiff also alleges that her discharge constituted an unconstitutional deprivation of her due process property and liberty rights. Finally, plaintiff asserts pendent state law claims for wrongful discharge, intentional infliction of emotional distress and prima facie tort. For the following reasons, defendants' motion for summary judgment is granted in its entirety.

FACTUAL BACKGROUND

In September of 1982, plaintiff was appointed to the position of Deputy Personnel Director for Examinations in the New York City Department of Personnel (the "DOP"). The Deputy Personnel Position was

an in-house position which plaintiff held on a provisional basis.

The record leaves little question that plaintiff was far from a model employee before she appeared before the State Senate Committee. For example, plaintiff has admitted that at a May 1984 meeting with representatives of the Sanitation Department, she called the Sanitation Commissioner, Norman Steisel, who was not present, a "fucking liar." Similarly, at a March 1985 meeting with Police Department officials and First Deputy Mayor Stanley Breznoff, plaintiff called the Police Department's chief of personnel, who was present, a "liar." These and other remarks of the plaintiff apparently led to complaints about her from Deputy Mayor Breznoff, Police Commissioner Benjamin Ward and the Chief of the General Litigation Division of the New York City Law Department.



Although, the City now cites these incidents as providing a basis for the decision to terminate plaintiff, it does not appear from the record before the court that those incidents were the basis of any disciplinary action against plaintiff prior to the time she made the statements to the State Senate Committee which give rise to her claim that her discharge violated her First Amendment rights.

In these circumstances, for the purpose of this summary judgment motion, the court could not conclude that the incidents that took place prior to plaintiff's statements to the State Senate Committee were the basis for her subsequent termination. Thus, the court must look to the statements which plaintiff made to the State Senate Committee and her subsequent conduct to determine whether there is a triable issue of fact on the question of whether plaintiff was



improperly terminated because of her exercise of her First Amendment rights.

In order to understand the First Amendment issues raised in this lawsuit, it is necessary to consider the background of plaintiff's appearance before the State Senate Committee. As part of her duties as Deputy Personnel Director for Examinations, plaintiff was responsible for the development and administration of all civil service examinations for the City of New York, which included the examinations for incoming police officers. In December 1984, Examination No. 4061 for police officers was administered by the City. In February 1985, the plaintiff and other officials of the DOP met with representatives of the Police Department, including Police Commissioner Ward, to establish a passing grade for Examination No. 4061. At that meeting, the Police Department personnel advocated a

passing grade of 82, while plaintiff advocated setting the passing mark at 89. Ultimately the passing grade was set at 85, which meant that a successful candidate was required to answer correctly 119 of the test's 140 questions. To achieve a score of 89, a candidate would have been required to answer correctly 125 of the 140 questions.

In June of 1985, plaintiff and the defendants Juan Ortiz, then DOP's Personnel Director, and Nicholas LaPorte, then DOP's First Deputy Personnel Director, met with members of the State Senate Committee which was then conducting a review of the management of the New York City Police Department. While there is a factual dispute in the record as to who first used the term "moron", plaintiff or a member of Senate committee staff, it is clear that, at a minimum, plaintiff responded affirmatively



when asked if it was possible that "a moron could pass" with the test score set at 85.

On July 11, 1985, plaintiff testified before the State Senate Committee and the following colloquy took place:

SENATOR GOODMAN: Is it not a fact that under questioning by this commission's staff you indicated that the written exam was so easy "that a moron could pass"

DR. PIESCO:

The conversation that we had was a very informal conversation, and if I used it as characterization, I think it was rather unfortunate. I was not obviously aware of the . . . that the conversation which was informal was in the way of cross-examination. I certainly would have modified my statement merely because the term "moron" is rather offensive and has certain technical meanings. The answer to your question is yes.

* * * *

SENATOR GOODMAN: Would a functional illiterate pass the functional portion in the police academy?

DR. PIESCO: At the pass mark that is set I would say that is possible.

It is apparent that plaintiff's testimony before the State Senate Committee caused some uproar and consternation within City government. On July 12, the day following plaintiff's testimony, her superior, Mr. Ortiz, wrote a memorandum to then-Mayor Koch "to give you some background on the issues raised in yesterday's hearings before the Goodman Committee" That memorandum stated in part:

It should be noted that the difference in a score of 89 and 85 percent is six items out of a 140 question test. Furthermore, 85 percent yielded a greater pool of candidates to meet the Department's hiring needs. And, at that pass mark, the disparate impact of the test was significantly minimized, thus reducing the risk of litigation and a possible injunction against all hiring. A passing score of 85 percent meant that a successful candidate correctly answered 119 out of 140 items on a



exam which was written above the tenth-grade reading level. It is obvious, therefore, that to call any successful candidate a 'moron' or 'functional illiterate,' is irresponsible because it is without basis in fact.

The following day, July 13, 1985, the *New York Post* carried an article quoting Ortiz as saying "that sworn comments by his deputy about 'functional illiterates' passing the last police exam were 'irresponsible' and he hinted he may fire her.

The next event of significance with respect to this litigation occurred on July 31, 1985, when a meeting was held at the DOP concerning Examination No. 4061. At this meeting were plaintiff, defendants Ortiz and LaPorte, the Department's General Counsel, Arthur Friedman, and its Deputy General Counsel, Michael Rabin. On August 2, 1985, defendant Ortiz prepared a memorandum to plaintiff setting forth what occurred at that meeting, which plaintiff

subsequently acknowledged to be accurate in substance.

The memorandum reflects that after Ortiz raised a question concerning plaintiff's admitted failure to look at the test or the questions before the test was administered, plaintiff "stood up, pointed [her] finger at [Ortiz] in an aggressive manner and yelled, 'You don't know a fucking thing about testing. I am fed up with your bullshit . . .'" Ortiz then asked plaintiff to calm down and conduct herself in a civil manner to which plaintiff replied, "I don't have to do a fucking thing. Why don't you fire me."

On August 13, 1985, plaintiff received two performance evaluations from the defendant LaPorte. For the period July 1, 1983 through June 30, 1984, plaintiff was rated "very good." She received a "marginal" rating for the period July 1, 1984

through June 30, 1985." According to plaintiff, in November or December 1985, Ortiz ordered her not to speak to a reporter for WNBC-TV. A memorandum to the file from Ortiz, dated December 9, 1985, indicates that an NBC reporter had requested plaintiff to appear, but Ortiz had decided to send another representative of the DOP.

On December 23, 1985, plaintiff served defendants with a summons and complaint in this action in which she alleged that in retaliation for her testimony before the State Senate Committee, she had been deprived of a raise, [sic] by her employer, the City of New York Department of Personnel, had been excluded and prevented from attending various meetings which her position required her to attend, and that defendant Ortiz, in non-privileged communications, intentionally and maliciously stated that Dr. Piesco was



irresponsible and derelict in the performance of her duties. On December 27, 1985, defendant Ortiz informed plaintiff that her employment was terminated as of that date.

DISCUSSION

I. Plaintiff's First Amendment Claim

While plaintiff asserts several causes of action, the heart of her complaint is the claim that she was terminated for the exercise of her First Amendment rights in connection with her statements to the State Senate Committee.

It is now beyond dispute that a public employee does not relinquish his or her First Amendment rights to comment on matters of public interest as a result of the individual's status as a governmental employee. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); *Connick v. Myers*, 461 U.S. 138,

140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983); *Rankin v. McPherson*, 483 U.S. 378, 383-84, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987), *reh. den.* 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d 819 (1987). As the Supreme court recognized in *Pickering*, a state employee's "right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." 391 U.S. at 574, 88 S.Ct. at 1738. At the same time, the Supreme court has also recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734.

Thus, the determination whether a public employer has properly discharged an employee for engaging in speech of a public

nature requires the court "to arrive at a balance between the interest of the [employee] as a citizen in commenting upon matters of public concern and the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35; see also *Connick*, 461 U.S. at 140, 103 S.Ct. at 1686. As the Supreme court reasoned:

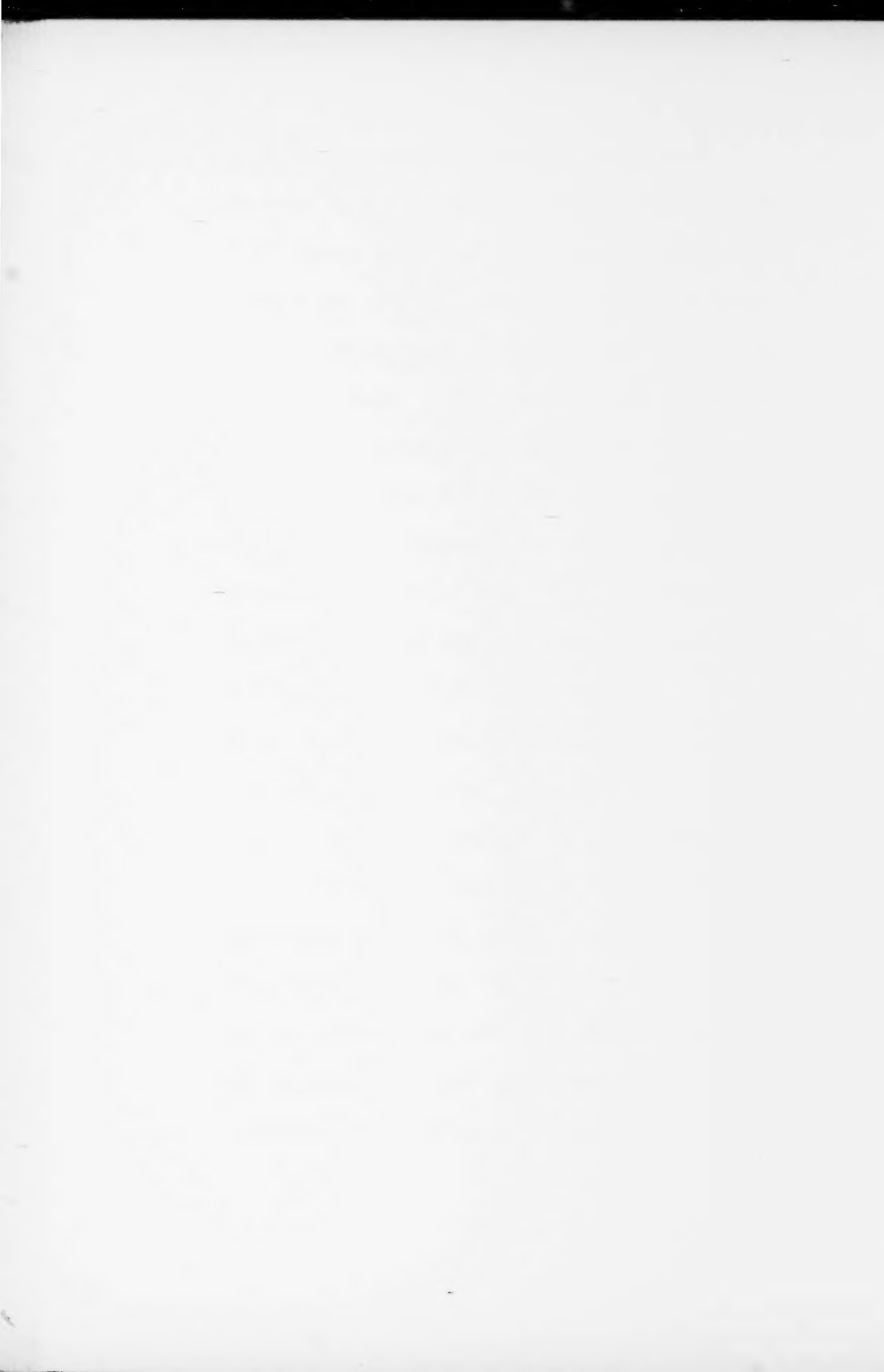
[t]his balancing test is necessary in order to accommodate the dual role of the public employer as provider of public services and as a governmental entity operating under the constraints of the First Amendment. On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, 'the threat of dismissal from public employment is ... a potent means of inhibiting speech.'

Rankin, 483 U.S. at 384, 107 S.Ct. at 2897 (emphasis in original).



Here, Dr. Plesco's statements to the State Senate Committee did relate to matters of public concern and therefore raise First Amendment issues which require application of the *Pickering* balancing test. The question the court must decide under *Pickering* is whether, despite the First Amendment implications in her statements, the City was nonetheless justified in terminating Dr. Plesco's employment because of those statements. This is a question of law that is properly decided on a motion for summary judgment. *Connick*, 461 U.S. at 148 n.7 and 150 n.10, 103 S.Ct. at 1690 n.7 and 1692 n.10; *Giacalone v. Abrams*, 850 F.2d 79, 87 (2d Cir. 1988).

Application of the *Pickering* balancing test to the present facts compels the conclusion that the City's interest, as an employer, in promoting the efficiency of the public services it performs outweighed



plaintiff's interest, as a citizen, in speaking out on matters of public concern. The court recognizes that, in the context of a legitimate inquiry by a State Senate Committee, Dr. Plesco was required to truthfully state her views on the validity of the passing grade established for the police examination and the issues presented before the Committee were clearly of public concern.

In determining that the City's interests outweigh the plaintiff's such that the discharge of Dr. Plesco because of her statements to the State Senate Committee was constitutionally permitted, we focus on the nature of plaintiff's comments viewed in the light of her responsibilities as Deputy Personnel Director for examinations.¹

¹ In performing the balancing test, the
(Footnote Continued)



The fixing of an appropriate passing grade for the police entry level examination, while one of public concern, was also one requiring sensitivity to the need to resolve competing social interests in an atmosphere

(Footnote Continued)

Supreme court requires that the subject speech not be "considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899, citing, *Connick*, 461 U.S. at 152-53, 103 S.Ct. at 1692-93; *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 415 n.4, 99 S.Ct. 693, 696, 58 L.Ed.2d 619 (1979).

In addition, the Supreme court has considered as pertinent factors:

whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

Rankin, 483 U.S. at 388, 107 S.Ct. at 2899, citing, *Pickering*, 391 U.S. at 570-573, 88 S.Ct. at 1735-1737.



free from public hysteria. As the memorandum from defendant Ortiz to then-Mayor Koch of July 12, 1985 indicates, one of the issues which had to be considered in setting the passing grade for the test was "the mandate of Title VII to minimize disparate impact on minority candidates." Selecting a passing grade of 85 percent rather than 89 percent "yielded a greater pool of candidates to meet the Department's hiring need. And, at that pass mark, the disparate impact of the test was significantly minimized." As Dr. Piesco's affidavit demonstrates, she was aware that, prior to 1985, there had been litigation brought by a class of minority group members challenging the written test used by the City to screen applicants for the Police Department on the ground that such tests were not job-related and had a disparate impact on minority members. *Guardians Ass'n of New York City*



Police Department v. Civil Service Commission of the City of New York, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), *cert. denied*, 463 U.S. 1228, 103 S.Ct. 3568, 77 L.Ed.2d 1410 (1983). Thus, the issue of the appropriateness of an 85% passing mark was one of important concern to the senior members of the City's administration, including the leaders of the Police Department and plaintiff's superiors in the Department of Personnel.

With this background, Dr. Piesco could not have failed to understand that her comments on the passing grade for the test were being made in the emotionally charged atmosphere of public debate on the minority hiring policies of the New York City Police Department. Thus, while Dr. Piesco had a right to express her views on the appropriateness of selecting a passing grade

of 85 for the police examination, as a senior public official she had the obligation to insure that her comments accurately reflected legitimate concerns, did not exacerbate unnecessarily a sensitive public issue and did not unfairly undermine the judgment made by her superiors and the senior officials of the Police Department. In these circumstances, it was totally inappropriate for Dr. Plesco to have stated that a "moron" could have passed the test, whether or not she herself interjected the term or simply acquiesced in someone else's characterization.²

Similarly, it was irresponsible for Dr. Plesco to testify that it was possible for a functional illiterate to pass the examination

² There is a sharp dispute as to whether or not Dr. Plesco herself introduced the term "moron" into the discussion with the staff of the State Senate Committee.



with a score of 85. The affidavits of Dr. Yakowicz in support of the motion for summary judgment indicates that even accounting for exceptionally good luck, a functional illiterate could not achieve a score of more than 60% on the test, i.e., a score of 85 correct answers out of a total of 140 questions. While it might be inappropriate to accept Dr. Yakowicz's affidavits as conclusive on a motion for summary judgment, Dr. Plesco's own affidavit responding to Dr. Yakowicz indicates that, if there was any possibility that a functional illiterate could pass the examination at a passing grade of 85%, that possibility was at best theoretical. Indeed, since the passing grade Dr. Plesco advocated -- 89% -- involved answering correctly only 6 more of a total of 140 questions than would a score of 85%, it is impossible to conclude that she honestly believed that there was a real

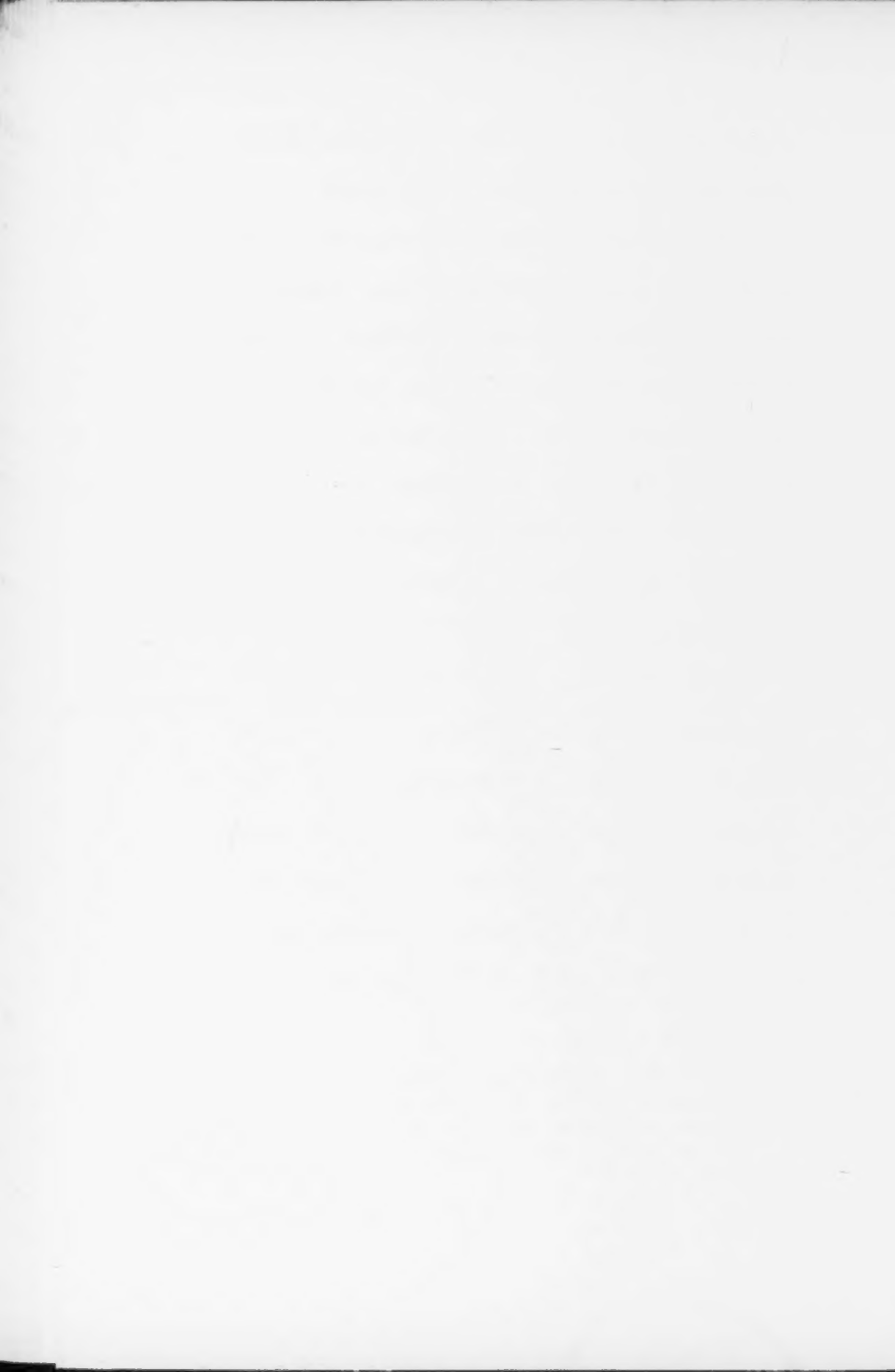


possibility that a functional illiterate would pass the test at the lower grade level.

It is not necessary, therefore, to resolve the conflict between Dr. Yakowicz and Dr. Plesco to conclude that it was irresponsible for Dr. Plesco to testify in a public hearing that it was possible for a functional illiterate to achieve a passing grade of 85% without amplifying her testimony to indicate how extremely remote that possibility was.

Plaintiff's superiors were amply justified in characterizing her testimony to the State Senate Committee as irresponsible. In determining whether that conduct was sufficient to justify her dismissal, weight has to be given to the important position which Dr. Plesco held for, as the Supreme court has stated:

. . . In weighing the state's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow



undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.

Rankin, 483 U.S. at 390, 107 S.Ct. at 2900.

As Deputy Personnel Director for Examinations and the chief official responsible for civil service examination matters in New York City, it was critical that plaintiff maintain a working relationship of trust and confidence not only with defendants Ortiz and LaPorte but also with other high-level City officials, including those in the Police Department. For a senior City official of Dr. Plesco's stature to make an irresponsible and inflammatory statement concerning a matter of such clear public concern as the appropriate passing level for candidates for the Police Department was certainly enough to undermine not only her



relationship with her superiors but also her relationship with senior officials in the Police Department. Given the importance of these working relationships to the performance of Dr. Plesco's important responsibilities, her conduct justified her termination. As the Supreme court also recognized in *Rankin*:

[I]nterference with work, personal relationships or the speaker's job performance can detract from the public employer's function. Avoiding such interference can be a strong state interest.

483 U.S. at 388, 107 S.Ct. at 2899.

Thus, in applying the *Pickering* balancing test and looking solely at Dr. Plesco's statements to the State Senate Committee, the court concludes that the City was justified in terminating her employment and is entitled to summary judgment on this claim.

Even if the City had not been justified in terminating Dr. Plesco's employment based solely upon her statements to the State



Senate Committee, summary judgment would still be appropriate given her subsequent conduct. While it might be argued that the question of whether Dr. Plesco's subsequent conduct provided justification for her termination involves factual issues of motivation that should not be decided on a summary judgment motion, in order "to arrive at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State as employer," which *Pickering* requires, 391 U.S. at 568, 88 S.Ct. at 1734-35, the court cannot ignore undisputed subsequent conduct which clearly belongs in the balance. As the Supreme court noted in *Connick v. Myers*, this is the type of situation which the court cannot "avoid making an independent constitutional judgment of the facts of the case." 461 U.S. 150, n.10, 103 S.Ct. at 1692, n.10,



quoting, *Jacobellis v. Ohio*, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793 (1964). Indeed, it would be unreasonable to ignore plaintiff's subsequent conduct in making the "constitutional judgment" since "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692 (emphasis added).

Thus, in assessing the City's claim that it was justified in firing Dr. Piesco, the court cannot ignore the fact that subsequent to the allegedly protected First Amendment statement to the State Senate Committee in June and July of 1985, plaintiff told her superior Mr. Ortiz, "You don't know a fucking thing about testing. I am fed up with your bullshit . . ." and, when told to

calm down, stated, "I don't have to do a fucking thing. Why don't you fire me?"

If plaintiff's statements before the Committee did not fatally undermine plaintiff's authority and destroy the close working relationships which were required for her to effectively perform her responsibilities, then plaintiff's outburst of expletives directed at her immediate supervisor certainly accomplished the task. As the Supreme court said in considering an analogous situation presented in *Connick*, 461 U.S. at 154 (1983):

[t]he limited First Amendment interest involved here does not require that [the employer] tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships.

This case, like all cases involving the *Pickering* balance, turns upon the particular facts and circumstances. In the present situation, the undisputed facts established



that plaintiff's conduct exceeded the bounds protected by the First Amendment. Thus, the court concludes that plaintiff's statements -- whether considering her testimony alone, her post-testimony statements alone or the statements in total -- so severely undermined the working relationships which were required for an effective performance of her duties that the City's interest as an employer outweighs Dr. Plesco's speech interest.³

II. Qualified Immunity

Even if the court had not determined that the *Pickering* balancing test favored the

³ Since the court concludes that First Amendment considerations did not preclude the City from firing Dr. Plesco on the basis of her State Senate Committee testimony alone or on the basis of her July 31, 1990 statements, it is irrelevant that the actual decision to terminate her employment was not made immediately.



defendants, the court, for the reasons discussed below, would nevertheless grant the motion of defendants LaPorte and Ortiz seeking dismissal on the grounds of qualified immunity.

It is well-settled that government officials performing discretionary functions are shielded from personal liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); see also *Magnotti v. Kuntz*, 90 Civ. 7497 (2d Cir. November 8, 1990); *Russell v. Coughlin*, 89 Civ. 2321 (2d Cir. August 2, 1990). Even when such rights are clearly established, qualified immunity also protects a government official "if it was objectively reasonable for [the official] to believe that his acts did not violate those



rights." *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987); see also *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

For purposes of the issue of qualified immunity, "we need answer only the limited question of whether it should have been apparent to [defendants LaPorte and Ortiz] that [plaintiff's] discharge violated [her] First Amendment rights." *Giacalone*, 850 F.2d at 88. Based upon our prior discussion of plaintiff's responsibilities and the disruption that plaintiff's conduct caused to the effective operation of the employer's office as well as to her working relationships, we conclude that the *Pickering* balancing test and the decisions construing it at the time of plaintiff's discharge (as well as decisions subsequent to the discharge) "would more likely have suggested" to defendants that plaintiff's "First Amendment



interest was outweighed by the disruption [her] action fostered." *Id.* As such, the court concludes that defendants LaPorte and Ortiz are immune from individual liability for damages.

III. Additional Constitutional and State Law Claims

Apart from her First Amendment claim, Dr. Piesco also asserts a number of other constitutional and common law claims. For the following reasons, defendants' motion for summary judgment with respect to each of these claims is granted.

Specifically, Dr. Piesco alleges that her dismissal amounted to a deprivation of her property interest without due process of law in violation of the Fifth and Fourteenth Amendments. In order to prevail, plaintiff must have had "constitutionally protected property ... or liberty rights to which the Fourteenth Amendment's procedural



protections would attach." *Schwartz v. Mayor's Comm. on Judiciary*, 816 F.2d 54, 56 (2d Cir. 1987), citing, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). However, as the Supreme court explained in *Roth*:

[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. - He must, instead, have a legitimate claim of entitlement to it.

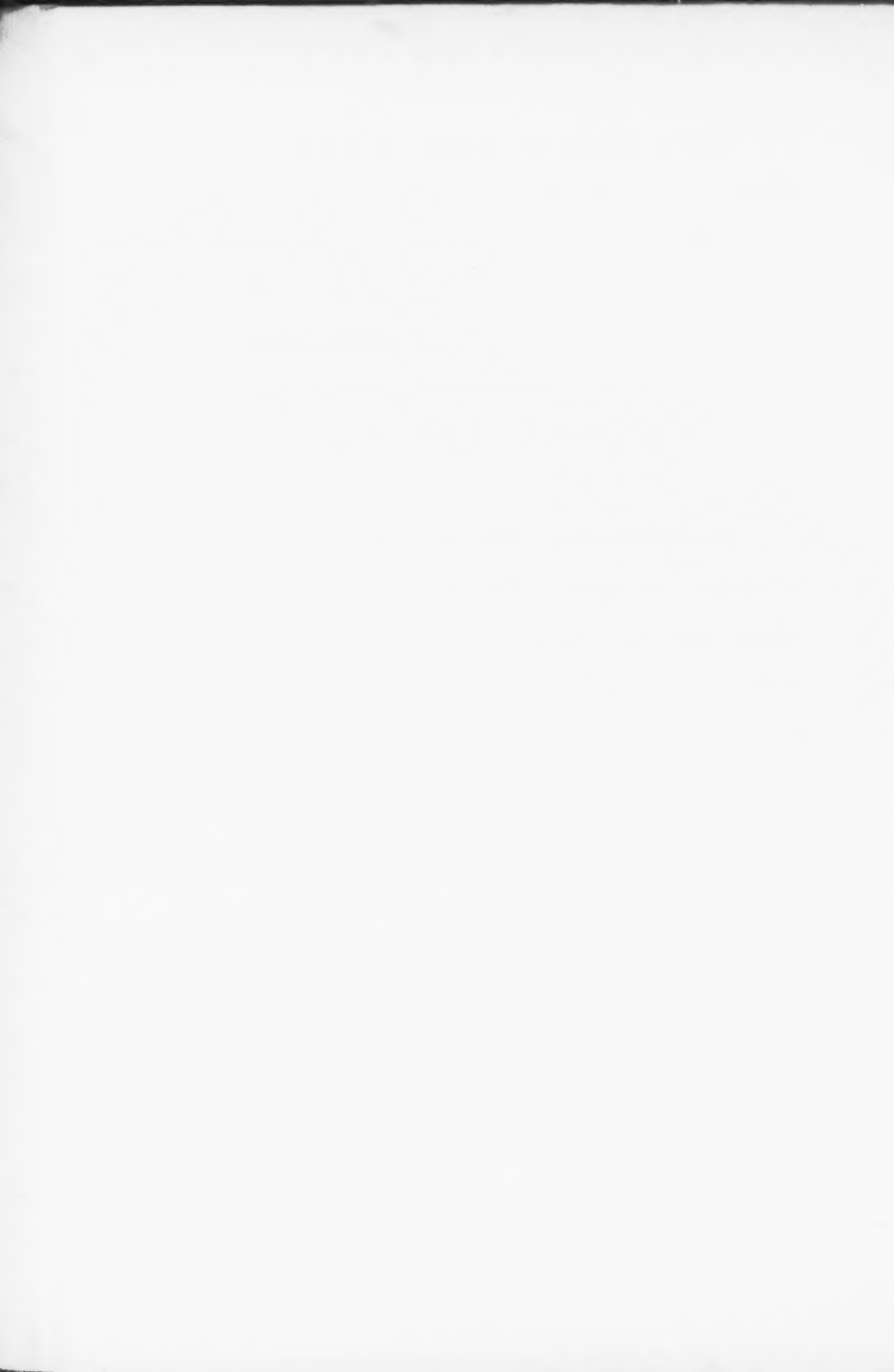
408 U.S. at 577, 92 S.Ct. at 2709.

"In the employment context, a property right arises only where the state is barred, by statute or contract, from terminating (or not renewing) the employment relationship without cause." *S & D Maintenance Co. v. Goldin*. 844 F.2d 962, 967 (2d Cir. 1988) (emphasis in original); Cf. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 538-39, 105 S.Ct. 1487, 1491-92, 84 L.Ed.2d



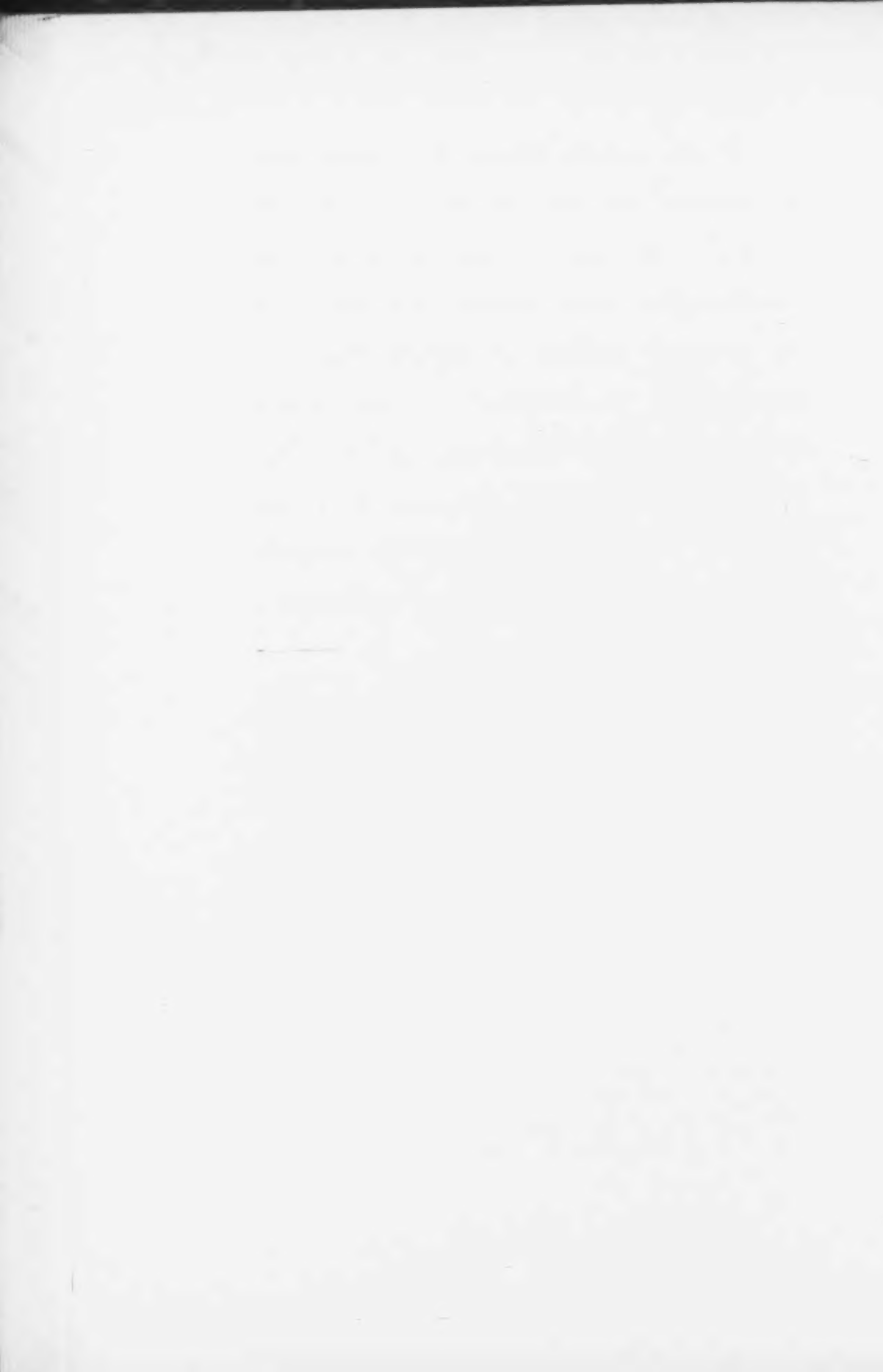
494 (1985) (property interest created by state civil service statute's for-cause termination provision) with Bishop v. Wood, 426 U.S. 341, 345, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976) (no property interest due to absence of for-cause provision) and Roth, supra, 408 U.S. at 578, 92 S.Ct. at 2709 (same).

In interpreting the Supreme Court's holdings, the Second Circuit has repeatedly found that an employee who, by relevant statute, may be discharged without cause and without a hearing, does not possess a property right protected by the due process clause of the Constitution. Goetz v. Windsor Central School District, 698 F.2d 606, 608 (2d Cir. 1983); Baden v. Koch, 638 F.2d 486, 492 (2d Cir. 1980), later app., 799 F.2d 825, 829 (2d Cir. 1986); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 448 (2d Cir. 1980).



In the present action, Dr. Plesco does not dispute that she was appointed in 1982 to the civil service title of provisional Administrative Staff Analyst and served in the in-house position of Deputy Personnel Director of Examinations. See Plesco February 24, 1986 Deposition, pp. 4-5; the defendants' Rule 3(g) Statement ¶ 1 and Exhibit 1 to defendants' motion for summary judgment.⁴ Plaintiff also does not dispute that, prior to her termination, she was a provisional employee under New York Civil Service Law § 65. Under New York State law, defendants are free to terminate provisional employees for any reason or for no reason at all. See *Preddice v. Callanan*,

⁴ Paragraph 1 of defendants' Rule 3(g) statement sets forth the provisional nature of plaintiff's employment. Plaintiff, as required, submitted her own Rule 3(g) statement in which she failed to take issue with ¶ 1 of defendants' Rule 3(g) statement.



69 N.Y.2d 812, 813-14, 513 N.Y.S.2d 958, 959, 506 N.E.2d 529 (1987) ("Appointments made pursuant to Civil Service Law § 65 are provisional in nature; provisional employees have no expectation of tenure and rights attendant thereto ... and therefore they may be terminated at any time without charges proffered, a statement of reasons given or a hearing held").

Accordingly, since plaintiff possessed no statutory property right in her position and the record presents no evidence that plaintiff possessed a property right based upon the parties' "mutually explicit understanding," *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), defendants' motion to dismiss this portion of plaintiff's due process claim is granted.

Plaintiff also appears to allege that defendants deprived her of a constitutionally



protected liberty interest in her "good name, reputation, honor or integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). In support of this claim, plaintiff alleges that she received yearly evaluations that were false and malicious and calculated to harm plaintiff's reputation, see Amended Complaint, ¶27(a), and that defendant Ortiz, in a "non-privileged communication," stated that plaintiff was "irresponsible and derelict in the performance of her duties ..." *Id.* ¶ 27(d). Apparently, the "non-privileged communication" to which plaintiff refers without specification is Ortiz' July 12, 1985 memorandum to the then-Mayor Koch in which Ortiz stated that "to call any successful candidate a 'moron' or a 'functional illiterate' is irresponsible because it is without basis in fact." Plaintiff further charges, in opposition to defendant's motion,

that she was stigmatized by a newspaper article in which then-Mayor Koch stated that plaintiff had "an axe to grind" (July 13, 1985 *New York Post*) and by an article in which defendant Ortiz is quoted as stating that he refused to redo his performance evaluations of plaintiff (January 4, 1986 *The New York Times*).

A government employee's liberty interest is implicated where the government has dismissed an employee based on charges "that might seriously damage [her] standing and associations in [her] community" or that might impose "on [her] a stigma or other disability that foreclose[s] [her] freedom to take advantage of other employment opportunities." *Brandt v. Board of Cooperative Educational Services, Third Supervisory Dist.*, 820 F.2d 41, 43 (2d Cir. 1987), quoting, *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707. In addition, the charges

against the employee must be made "public" by the government employer, *Bishop*, 426 U.S. at 348-49, 96 S.Ct. at 2079-80; *Quinn*, 613 F.2d at 446-47, and the employee must allege that the charges are false. *Brandt*, 820 F.2d at 43, *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 883, 51 L.Ed.2d 92 (1977).

An essential element of a deprivation of liberty claims is that the stigmatization results from the termination. *Gentile v. Wallen*, 562 F.2d 193, 197 (2d Cir. 1977); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), *reh. denied*, 425 U.S. 985, 96 S.Ct. 2194, 48 L.Ed.2d 811 (1976). In other words, it is not sufficient for a liberty claim "that there simply be a defamation by a state official; the defamation had to occur in the course of the termination of employment." 424 U.S. at 710, 96 S.Ct. at 1165; *see also Neu v. Corcoran*, 869 F.2d

662, 667 (2d Cir. 1989), *cert. denied*, ___
U.S. ___, 110 S.Ct. 66, 107 L.Ed.2d 33
(1989).

In the present case, plaintiff cannot rely on either the Ortiz' performance evaluations or on Ortiz' memorandum to Koch since the allegedly stigmatizing statements contained in these documents were not published in the course of plaintiff's termination.⁵ Moreover, without reaching

⁵ The court recognizes that the Second Circuit has held that the publication requirement may be satisfied if the employee shows that the stigmatizing material was placed in her personnel file and that prospective employers are likely to gain access to it. *Brandt*, 820 F.2d at 45; *Velger v. Cawley*, 525 F.2d 334, 336 (2d Cir. 1975), *rev'd on other grounds*, *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). In the present case, however, plaintiff does not allege that any prospective employer has even attempted to gain access to her file, if it still exists, in the more than five years that have elapsed since the performance evaluations were prepared.

the issue of falsity and even assuming that the "publication" requirement has been satisfied with respect to any or all of the materials upon which plaintiff relies, the court finds that the statements were not sufficiently stigmatizing to support a due process claim. First, plaintiff has not shown that her reputation, good name, honor or integrity has been stigmatized by her discharge. "It is well settled that for a discharge to create a 'stigma,' 'it must be something considerably graver than a charge of failing to perform a particular job." *Petrozza v. Freeport*, 602 F. Supp. 137, 144 (E.D.N.Y. 1984), quoting, *Russell v. Hodges*, 470 F.2d 212, 217 (2d Cir. 1972). Here, while defendants' statements may have amounted to a shade more than simply that plaintiff could not adequately fulfill her responsibilities, the statements nevertheless fall far short of the type found stigmatizing

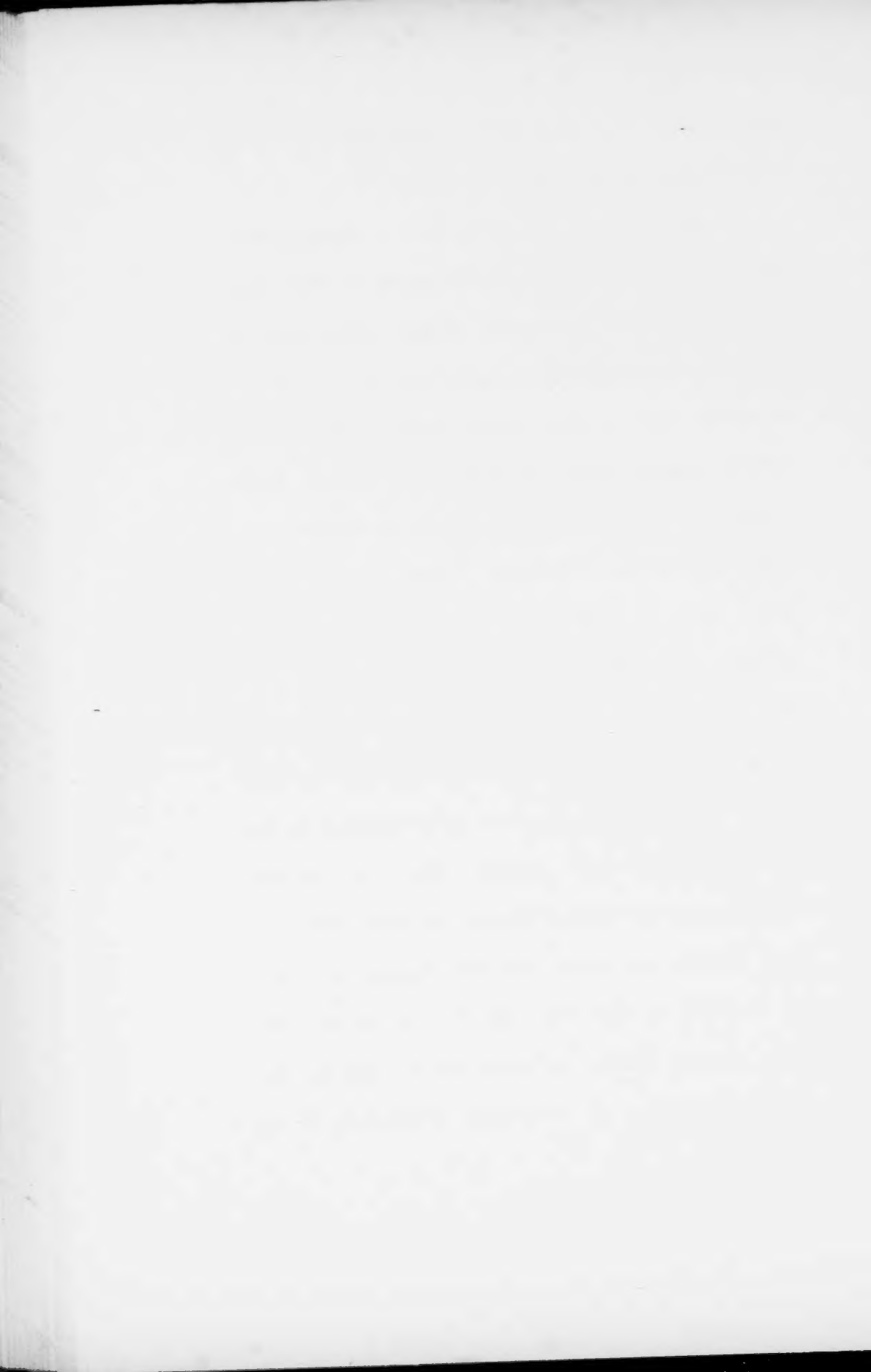


by courts in this Circuit. Cf., e.g., *Brandt v. Board of Cooperative Educational Services, Third Supervisory District*, 820 F.2d 41, 43 (2d Cir. 1987) (in action in which teacher terminated due to his alleged sexual misconduct involving autistic students, court recognized that "charges that the employee is guilty of dishonesty or immorality are stigmatizing") and *Saraceno v. Utica*, 733 F. Supp. 538, 543 (N.D. N.Y. 1990) (allegations of insubordination, incompetence and misconduct insufficient). Second, plaintiff has not alleged, let alone demonstrated, that, in the five years since she was terminated, her future employment opportunities have been irreparably damaged by the "publication" of the allegedly stigmatizing materials. *Roth*, 408 U.S. at 574, 92 S.Ct. at 2708. Accordingly, the court finds that there is no genuine issue of



fact as to plaintiff's assertion of a deprivation of a liberty interest.

The court also grants defendants' motion to dismiss plaintiff's pendent state law claims. Plaintiff asserts claims for wrongful discharge, intentional infliction of emotional distress and prima facie tort. However, these claims were foreclosed by the New York court of Appeals' holding in *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983). In this action, the court declined the plaintiff's invitation to alter New York's "long settled rule that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason at all." 58 N.Y.2d at 301-302, 461 N.Y.S.2d at 235. The court, thus, refused to recognize the tort of abusive or wrongful discharge of an



at-will employee. *Id.*; see also *Gorrill v. Icelandair/Flugeidir*, 761 F.2d 847, 851 (2d Cir. 1985); *Mounayer v. Brown & Williamson Tobacco Corp.*, 89 Civ. 7476, 1990 U.S. Dist. LEXIS 6285, 5 BNA IER Cas. 892 (S.D.N.Y. May 24, 1990).⁶

In addition, the *Murphy* court also held that, in light of its holding "that there is now no cause of action in tort in New York for abusive or wrongful discharge of an at-will employee, plaintiff should not be

⁶ The court of Appeals in *Murphy* also reaffirmed that an employer could not terminate its employee based on a "constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment." 58 N.Y.2d at 305, 461 N.Y.S.2d at 237. Here, the court has already decided that plaintiff's termination was not for a constitutionally impermissible purpose or in violation of a statutory proscription. In addition, the record is devoid of any evidence that plaintiff was employed pursuant to a contract which precluded his termination under the circumstances of this or any case.



allowed to evade that conclusion or to subvert the traditional at-will contract rule casting his cause of action in terms of a tort of intentional infliction of emotional distress." *Murphy*, 58 N.Y.2d at 303, 461 N.Y.S.2d at 236. The court then reached the same conclusion with respect to a claim of prima facie tort. 58 N.Y.2d at 304, 461 N.Y.S.2d at 237. See also *Mounayer*, at p. 11; *D'Avino v. Trachtenburg*, 149 A.D.2d 399, 539 N.Y.S.2d 755, 757 (2d Dep't), *app. denied*, 74 N.Y.2d 611, 546 N.Y.S.2d 556, 545 N.E.2d 870 (1989).

Moreover, even assuming that plaintiff's intentional infliction of emotional distress and prima facie tort claims are not foreclosed by *Murphy*, plaintiff has failed to satisfy the elements of these claims. For instance, the tort of intentional infliction of emotional distress "predicates liability on the basis of extreme and outrageous conduct, which so



transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143, 490 N.Y.S.2d 735, 741, 480 N.E.2d 349 (1985), citing, *Fischer v. Maloney*, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991, 993, 373 N.E.2d 1215, 1217 (1978). Under the facts as alleged by plaintiff, defendants' conduct falls far short of meeting the above standard.

Prima facie tort permits recovery for the intentional infliction of harm, without any excuse or justification, by an act or series of acts which would otherwise be lawful. *Freihofer*, 65 N.Y.2d at 142-43, 490 N.Y.S.2d at 741; *Backus v. Planned Parenthood of Finger Lakes*, ___ A.D.2d ___, 555 N.Y.S.2d 494, 495 (4th Dep't 1990); *Dalton v. Union Bank of Switzerland*, 134 A.D.2d 174, 520 N.Y.S.2d 764, 767 (1st Dep't 1987). In addition, "[a] critical



element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages." *Freihofer*, 65 N.Y.2d at 143, 490 N.Y.S.2d at 741. In the present action, even assuming that defendants' sole motivation in terminating plaintiff was "disinterested malevolence," *Backus*, 555 N.Y.S.2d at 495, Dr. Piesco's prima facie tort claim must be dismissed since "no special damages are alleged and apparently none exist." *Freihofer*, 65 N.Y.2d at 143, 490 N.Y.S.2d at 741; see also *Loudon*, at pp. 6-9; *Dalton*, 520 N.Y.S.2d at 767; *Alexander & Alexander, Inc. v. Fritzen*, 114 A.D.2d 814, 495 N.Y.S.2d 386, 389 (1st Dep't 1985).



CONCLUSION

For the reasons expressed above, defendants' motion for summary judgment is granted in its entirety. Accordingly, each and every cause of action is dismissed as against each defendant.

Dated: New York, New York
December 18, 1990

JOHN S. MARTIN, JR.,
U.S.D.J.



ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT,
ENTERED JUNE 3, 1991

At a stated Term of the United States
Court of Appeals for the Second Circuit,
held at the United States Courthouse in the
City of New York, on the 3rd day of June,
one thousand nine hundred and ninety-one.

Present: HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,
HON. GEORGE C. PRATT,

Circuit Judges,

DR. JUDITH PIESCO,

Appellant,

-v.-

THE CITY OF NEW YORK, DEPARTMENT OF
PERSONNEL, JUAN ORTIZ, and NICHOLAS
LaPORTE, JR.,

Appellees.

Appeal from the United States District
Court for the Southern District of New
York.

This cause came on to be heard on the
transcript of record from the United States
District Court for the Southern District of
New York and was argued by counsel.

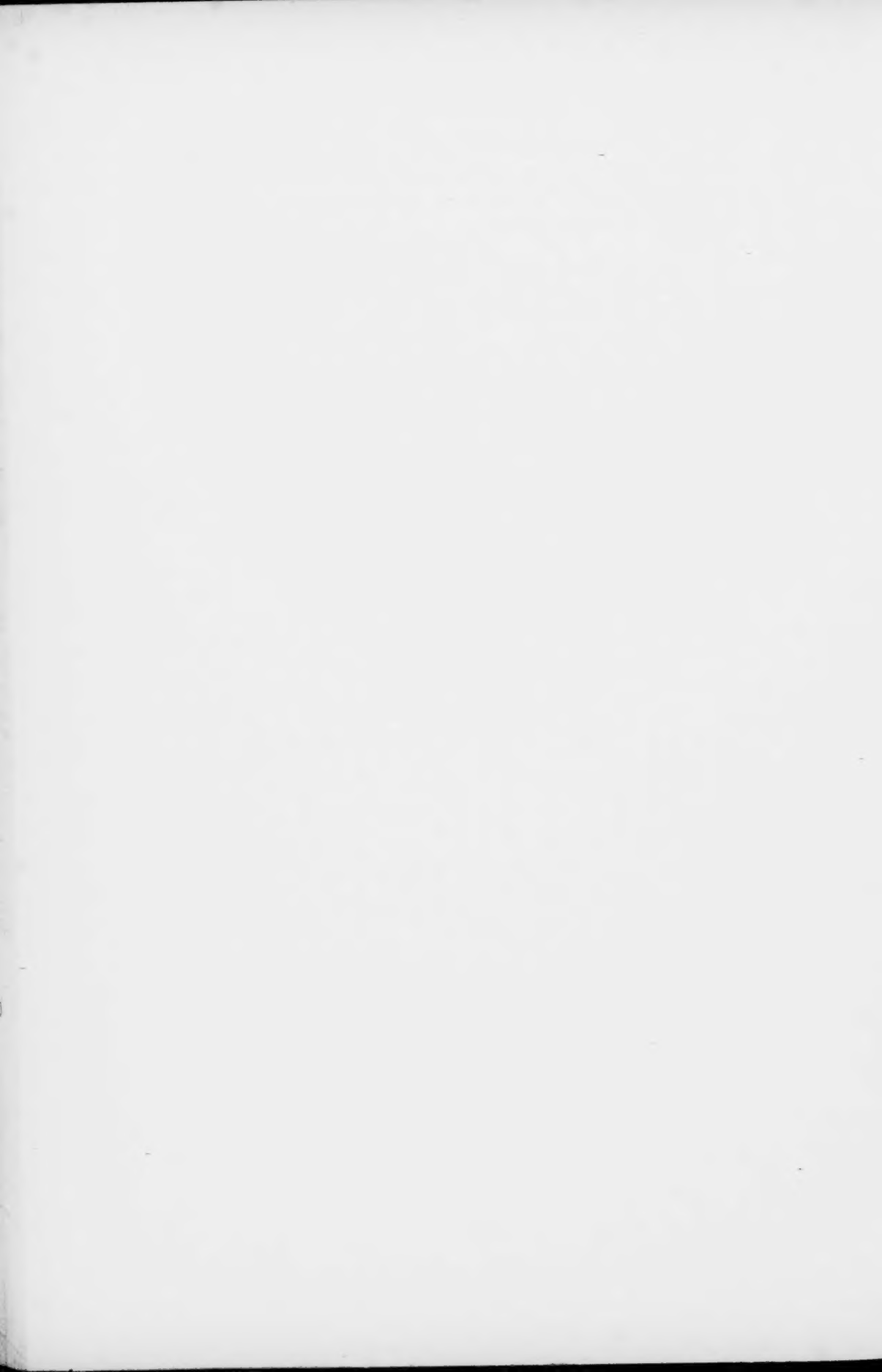
ON CONSIDERATION WHEREOF, it is
now hereby ordered, adjudged and decreed



that the judgment of said District Court be and it hereby is reversed and remanded in part; affirmed in part in accordance with the opinion of this Court.

Elaine B. Goldsmith,
Clerk

by: Edward J. Guardaro,
Deputy Clerk



JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK, ENTERED
DECEMBER 26, 1990

DR. JUDITH PIESCO,

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF
PERSONNEL, JUAN ORTIZ, NICHOLAS
LaPORTE, JR., and EDWARD I. KOCH,

Defendants.

Defendants having moved for summary judgment and the said motion having come before the Honorable JOHN S. MARTIN, U.S.D.J., and the court thereafter on December 19, 1990, having handed down its memorandum opinion (#67198); granting in its entirety defendants' motion for summary judgment, and dismissing each and every cause of action as against each defendant, it is,



ORDERED, ADJUDGED AND DECREED:

That defendants' motion for summary judgment be and it is hereby granted in its entirety, and it is further,

ORDERED, that each and every cause of action be and it is hereby dismissed as against each defendant.

DATED: NEW YORK, NEW YORK
December 26, 1990

Raymond F. Bughart
Clerk

Supreme Court, U.S.
FILED
SEP 17 1991
OFFICE OF THE CLERK

91-359

IN THE

SUPREME COURT OF THE UNITED STATES

=====

THE CITY OF NEW YORK, DEPARTMENT OF
PERSONNEL, JUAN ORTIZ, AND NICHOLAS
LA PORTE, JR.,

Petitioners,

v.

DR. JUDITH PIESCO,

Respondent.

=====

Brief In Opposition to
Petition for Certiorari to
The United States Court of Appeals
For the Second Circuit

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New York, N.Y. 10009

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COUNTER-STATEMENT OF THE
QUESTION PRESENTED

Under the First Amendment protected speech component, does an employee of the executive branch of state government, testifying under oath before a state legislative oversight committee on matters of public concern, have a duty to shade her sworn response to questions posed, in order to conform to the political objectives of the employer, upon pain of adverse personnel action.



COUNTER-STATEMENT OF THE CASE

The United States District Court for the Southern District of New York, in its decision dismissing the complaint, ruled that although Dr. Piesco was testifying under oath before the Governmental Operations Committee of the New York State Legislature, on matters of public concern and had a duty to answer questions truthfully, that, as a matter of law the interest of furthering the employer's agenda outweighed Piesco's duty to respond truthfully and directly in her own way to the questions posed. (A-75)

The district court also determined that the testimony of Dr. Piesco that it was possible for a functional illiterate to pass the police officer examination at the mark set was irresponsible (A-76). It further held that the superiors were

immune from suit. (A-86)

The Court of Appeals in reversing the judgment held that an employee of the executive branch, testifying under oath before a legislative oversight committee, had no duty to "shade" her testimony to conform with the political objectives of the employer upon pain of adverse personnel action (A-36) and that the district court did not accord proper weight respecting the balance of interests. It further disagreed with the district court that the testimony was irresponsible as a matter of law. (A-23) The Court of Appeals also noted that there were no affidavits by anyone with knowledge of the facts upon which to conclude that Piesco would have been discharged either for the testimony alone, her other alleged activities alone, or for a combination of both, or that the pre-discharge actions of the employer as well as the discharge itself were not retaliation for the testimony given. (A-

45) The court also held that Ortiz and LaPorte were not immune from suit. (A-53)

REASONS FOR DENYING THE WRIT

All parties, and the district court agree that Dr. Piesco was testifying as an executive branch employee under oath on matters of public concern before a legislative branch oversight committee, and that she had a duty to answer truthfully.

(a) The First Amendment and Retaliation.

Petitioner adopts the analysis of the 2d Circuit respecting this issue and will not repeat it here. One need only consider that the 2d Circuit did not grant absolute first amendment protection to legislative testimony given by every high-ranking government official under Pickering v Bd. of Education, 391 U.S. 563 (1968), nor did it hold that actual disruption of governmental operations was always necessary to justify employer acts.

The court merely indicated that important weight should be accorded sworn

legislative testimony, given without fear of retaliation, and that in this instance the district court did not appropriately weigh that factor.

Thus, for example, the 2d Circuit specifically suggested that were Dr. Piesco merely a disgruntled employee who was not subpoenaed or threatened with subpoena, (A-37) who was seeking to undermine the employer, the weight given would not be as high as in this case. The court observed that "...This case is readily distinguished from those cases where a disgruntled employee voluntarily comments upon an employment-related matter out of a personal interest." (A-32)

The 2d Circuit did not confer absolute protection to all sworn testimony before a legislative committee, nor was the testimony of Dr. Piesco given absolute protection. It merely was not given sufficient weight by the district court. It can be stated with some confidence that one could hardly think of a stronger

necessity for candor and truth than in the facts in this case. Moreover Dr. Piesco's superior, Petitioner Juan Ortiz, sat next to her at the hearing, and there is no indication that he counseled her to answer differently or to elaborate. (A-38)

In balancing the competing interests, the district court incorrectly concluded that the testimony was irresponsible, a conclusion disputed by the 2d Circuit (A-23) which issue is discussed infra. It also failed to give appropriate weight to the forum of the legislative branch with its particular need for candor and information necessary for its legislative and oversight functions, the fact that the testimony was under oath, and that there was a direct answer to a direct question.

Moreover the 2d Circuit observed that there was no affidavit by Ortiz or LaPorte or anyone else with knowledge of the facts in support of the motion upon which to conclude that there was underminig of the effective and efficient

operations of the agency or that the testimony impeded the proper performance of Dr. Piesco's duties or that there existed any condition supported by proof that would add dispositive weight under Connick v Myers, 461 U.S. 138 (1983) (A-45) to Petitioner's side of the balance.

Neither the district court, nor the petitioners in this court have advanced any authority upon which to conclude that a high ranking employee of the executive branch testifying under oath on matters directly relating to the witness' sphere of responsibility, before a legislative branch committee which has specific oversight respecting that sphere of responsibility, has a duty to shade the sworn response a question so as to conform with the political objectives of the employer, upon pain of adverse personnel action.

One would hardly fault the elected officials of the executive branch, in a

separation of powers/checks and balances context, were they to join in a chorus of that beloved spiritual, Oh Happy Day!, upon the ensconcement by prestigious judicial edict of such a wild proposition. The Court of Appeals correctly determined that such a state of affairs would undermine the very foundations of government. (A-41)

(b) The Testimony was not Irresponsible.

The district court's conclusion that the testimony was irresponsible was based on the fact that in order to achieve a grade of 89, advocated by Piesco one had to answer 125 questions correctly and that to achieve an 85, the mark which was finally set, one had to correctly answer 119 questions. Both the district court and the petitioners have used the phrase "only six questions" to describe the difference in performance as partial justification for the conclusion reached that the testimony was irresponsible.

Additionally, the petitioners rely

heavily on their assertion that the testimony was irresponsible because Piesco's conclusions were based on her limited view that a functional illiterate would be able to achieve the passing grade through "wild guessing and sheer luck" (Fns., Pet. pp. 13, 28). Petitioners know full well that Piesco ascribed her conclusion to more than just wild guessing and sheer luck. According to her affidavits in opposition to the motion her conclusions were based on the fact that (1) the test was a four-answer multiple choice type examination with no penalty for guessing incorrectly, (2) over and above cognitive ability, the facial 25% chance in wild guessing was enhanced by elimination of obviously wrong answers, (3) the fact that the same outside expert who was hired by the Department of Personnel to produce the examination was also hired by the Police Department to tutor some of the candidates who were going to take the test, and that (4)

proctors read the instructions to the candidates. (CA360-364)

Professor Yakowitz, in support of the motion - on behalf of the city, originally opined that a functional illiterate had the ability to answer 50% of the examination. When he was confronted with the opposing affidavit of Piesco setting forth the four grounds for her opposition to lowering the passmark, and that perhaps Yakowitz forgot that there was no penalty for guessing, Yakowitz responded that indeed he had considered such an element in his conclusions, then he raised his sworn estimate to the ability of a functional illiterate to answer 60%. However he continued to completely ignore the elements of elimination of obviously wrong answers, the tutoring of candidates by the developer of the examination and the fact that proctors read the instructions to the candidates at the time of the examination. Even so the professor



used the term "virtually impossible" in the initial and reply affidavits he submitted, which adjective admits the possibility.

It is totally unreasonable for the Petitioners to adhere to the assertions contained in footnote on p. 13, and again the footnote on p. 28 of the Petition which unfairly limits the basis for Piesco's conclusions to "wild guessing" and "sheer luck". The Petitioners did likewise in the Court of Appeals. Piesco's reply brief, p.7, in the Court of Appeals in response thereto specifically states:

Appellees appear to continue ignoring the factors of excluding obviously wrong answers and the fact that the preparer of the examination also tutored some of the candidates as those factors impact on the conclusions to be drawn. Thus at Br. 22 they allege that Piesco only indicated in her affidavit that "wild guessing" and "sheer luck" were the only considerations upon which Piesco based her analysis, and hence the possibility of a functional illiterate



achieving a grade of 85% was at best theoretical. Unfortunately neither the Appellees or Yakowitz have made known their views respecting the factors of excluding obviously wrong answers and the tutoring of candidates by the test preparer as they relate to predictable test passers. Nor have they discussed the significantly large percentile differences shown by their own chart.

Further. the Petitioners continue to use the phrase "only six questions" as they did in the Court of Appeals, to convince this Court of the irresponsibility of the Piesco conclusions. Once again, in response to that phrase in the Court of Appeals it was pointed out in Piesco's reply brief that, according to the city's own statistical chart submitted on the motion, to gain a mark of 89 one had to answer 125 questions correctly which was achieved by 52.4% or approximately the top half of the test takers. On the other hand a candidate with the lowered passmark of 85 had to answer 119 questions correctly which was



achieved by 70.04% of the candidates placing such successful candidate well within the bottom third of the test taking population where one would expect to find a functional illiterate. The Court of Appeals specifically refused to subscribe to the notion of "only" six questions when it observed at A-23:

Since such a significant percentage failed to answer those questions correctly, we fail to see how that statistic clearly undermines the veracity of Dr. Piesco's testimony. In any event, whether a functional illiterate could pass the police examination presents a material factual question which is disputed by the parties. Summary judgment is an inappropriate vehicle to resolve such factual issues.

The district court based its dismissal on the mistaken belief that the testimony was irresponsible as a matter of law. (A-77) As has been shown, there is a generous abundance of evidence to suggest that the testimony was not irresponsible.

(c) Other Conduct.

There is no affidavit by Ortiz or LaPorte that the use of foul language or any other objectionable conduct was the cause of the adverse personnel action, nor was it ever conceded by Piesco that complaints were received by other agencies. (Pet. fn. p.5). Nor is there any assertion by anyone that examinations were not given or that the large staff of the Examinations Division was not appropriately supervised by Piesco after the testimony.

The Court of Appeals correctly observed at A-45 that, "Neither Ortiz nor LaPorte has submitted affidavits explaining how their working relationship with Dr. Piesco was affected by her testimony or how the operations of DOP were disrupted."

The observation that Piesco used the adjective "Fucking" was discounted by the Circuit Court which had before it sworn affidavits by Piesco that such an

adjective was used regularly in informal discussions not only by her and her superiors, but by other high ranking members of the executive branch as well.

For example, Piesco asserted in her opposing affidavit to the motion that the then Sanitation Commissioner Norman Steissel (now Deputy Mayor) referred to Juan Ortiz and Judith Piesco as "Fucking Idiots" and in response Piesco called Steissel a "Fucking Liar". The reaction of Ortiz, Piesco's superior, to this exchange, according to the affidavit was to congratulate Piesco and make her liaison between the Hispanic Society of the Sanitation Department, whereat she used the term, and the Department of Personnel. (CA-367) The assertion was not contradicted any reply affidavit. If the male superiors and co-workers regularly chose to use such machismo language at agency and inter-agency discussions in the presence of a female participant, they cannot retroactively be heard to complain

that the use of such language by the female somehow justified retaliation, or dismissal as a matter of law.

(d) Immunity

The Circuit Court was correct at A-49 in determining that under Harlow v Fitzgerald, 457 U.S. 800 (1982) and Anderson v Creighton, 483 U.S. 635 (1987), an official does not have immunity where the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Ortiz, who is an attorney, and LaPorte were not immune from suit. Petitioners Ortiz and LaPorte authored and promulgated for city-wide use, Department of Personnel regulations, Guidelines for Evaluating Managerial Performance in New York City, referred to in the Court of Appeals decision at A-13. After Piesco's testimony LaPorte and Ortiz prepared two simultaneously issued and retroactive downgraded performance evaluations of Piesco covering each of the two years next

preceding the testimony. Those performance evaluations changed key responsibilities from her prior "outstanding" evaluations without consultation with Piesco as required by Ortiz' own regulations.

Prior to her dismissal and upon her complaint to the Department of Investigations an agency of Petitioner, the City of New York, a hearing was held specifically dealing with the downgraded retroactive evaluations and other harassments. With respect to the evaluations, the Department of Investigations concluded that this treatment resulted in part, from Piesco's testimony at the Goodman hearing. It recommended that Dr. Piesco receive new performance evaluations. (A-13) The senate committee at a post discharge investigation reached a similar conclusion of retroactive retaliation. (A-15) The Court of Appeals at A-53 correctly concluded that "In light of the DOI

report, it is incomprehensible how Ortiz and LaPorte reasonably could have considered their subsequent discharge of Dr. Piesco to be lawful."

In New York, administrative agency rules have the force and effect of law and are as binding on the agency as they are on the employees. Jordan v Martin, 152 NY 311 (1897); Frick v Commissioner, Department of Civil Service, 56 NY2d 777. Generally speaking rules of administrative agencies which regulate procedure affecting substantial rights of individuals may not be waived. Service v Dulles, 354 US 363; People ex rel Jordan v. Martin, 152 NY 311.

Ortiz and LaPorte both were the authors and promulgators of the regulations. They cannot be said to have been ignorant of the illegality of their actions. The Department of Investigations concluded that the evaluations were illegal and that they be redone. Both Ortiz and LaPorte declined the invitation



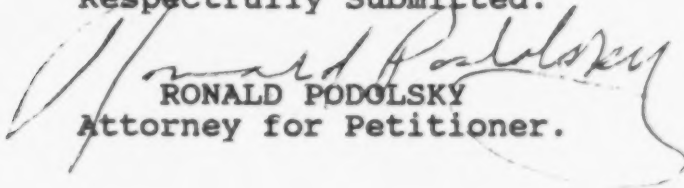
and opportunity to redo the adverse evaluations, which still repose in Dr. Piesco's file, and served as justification for the dismissal.

CONCLUSION

The Petition for a writ of certiorari should be denied.

September 14, 1991.

Respectfully Submitted:


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